FACULTY OF LAW

UNIVERSITY OF TORONTO

MATERIALS ON CONFLICT OF LAWS

January 1995

Volume III

John Swan

Aird & Berlis
Toronto

Vaughan Black

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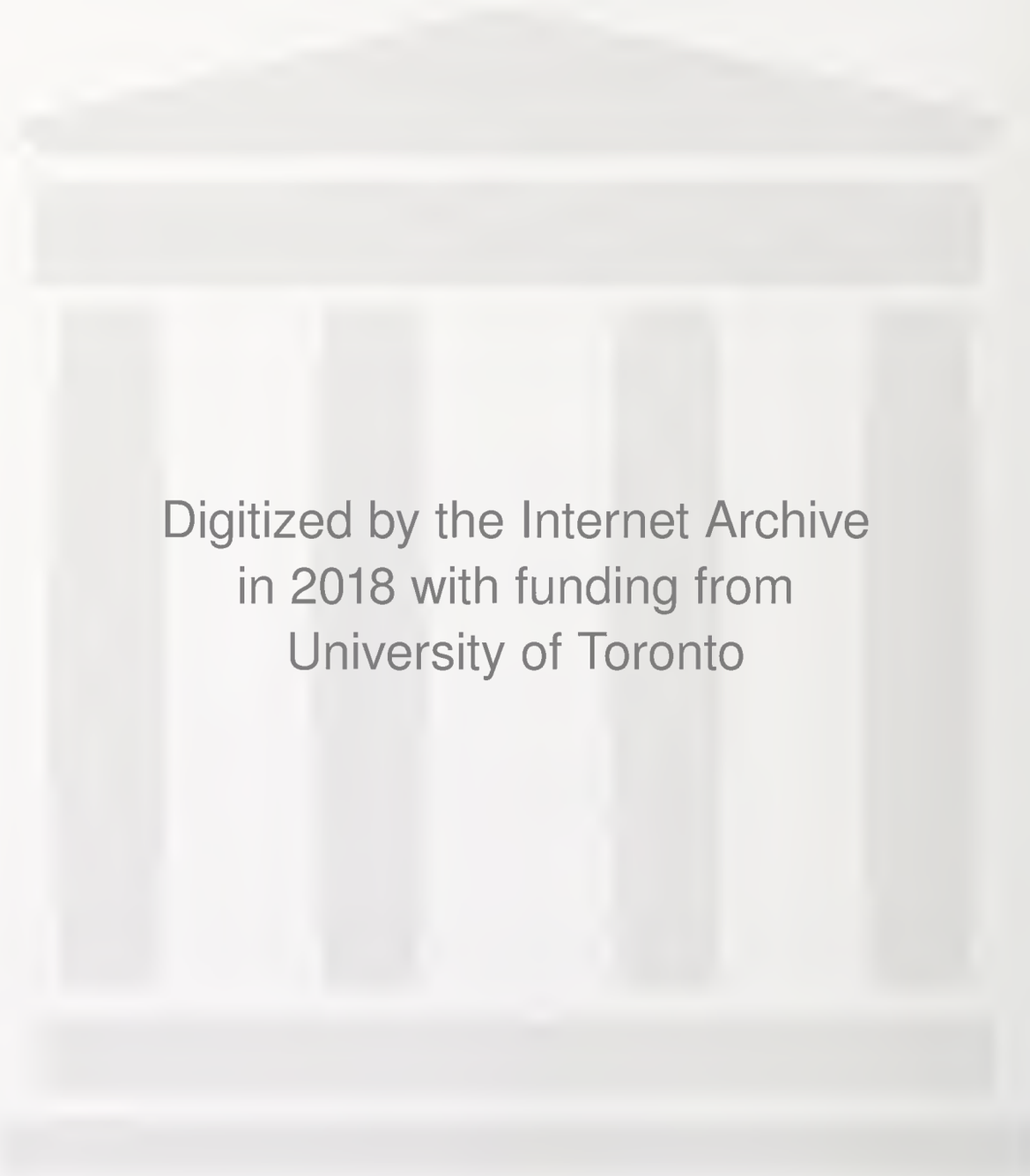
We are grateful for the help that has been given by students, now too numerous to mention individually, over the past many years in the constant revisions in the organization and text of these materials.



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PART II

FAMILY LAW

Introduction

The conflicts problems of family law present the same features as the conflicts problems of contracts and torts. In one sense, the problems are more serious: the legal problems are frequently much more important for the parties, and we have to be much more concerned that the solutions we reach are satisfactory. Recent legislation in Ontario and other Canadian provinces has, to some extent, relieved the conflicts problems so that some traditional areas of difficulty are of far less significance now than they were some years ago. Conversely, the great upheaval that has occurred in the domestic law of the Canadian provinces has created new problems. As we saw in our examination of the conflicts problems of Contracts and Torts, the Conflicts problems of Family Law are parasitic on or derived from the problems we encounter in our own law, and in the principles that we use there.

Once again, it will be necessary to examine the process of reasoning about conflicts problems to discover how one should reason and what happens if one adopts one process of reasoning rather than another. The basic conflicts problems of the choice of law process, jurisdiction and recognition of foreign judgments remain.

You will remember from your introductory courses in Contracts and Torts that a beginning of an understanding of the law was the realization that a maxim like, "*pacta sunt servanda*" expressed, at best, no more than an ideal or a starting point for legal reasoning. It could never operate as a rule to be applied to all cases of contracts or promises. Yet at the same time you knew, or tried to hang onto the feeling or belief that, back of the contract and tort cases, rules and principles, there were some fairly important and basic moral ideas and, what is more important, that these mattered. Such knowledge or such a belief has to be kept in control and has to become or be regarded as an objectively existing preference for certain values. In other words, to be able to reason *usefully* about contracts or torts problems, one has to be able to stand back from one's moral feelings and assess their strength and relevance. The same distancing process has to be undertaken for economic, social or political values. Sometimes this distancing process is hard both to accept and to undertake. Our intuitive preferences are often very seductive and, of course, so obvious valid to any right-thinking person!

One of the most difficult of all intellectual exercises that one encounters in dealing with the law is in doing the same kind of distancing in regard to our views of the family. It is precisely because it is so difficult to get a perspective on our views of what is morally, doctrinally, or sexually right that it is essential to try and to succeed. We cannot begin to handle the legal problems of families unless we realize that feelings and beliefs that we think are obvious and eternally valid are often little more than instinctive prejudices that we have simply accepted with little or no thought because of how we were brought up, educated or indoctrinated by some religious teaching. The ability to maintain a perspective on our beliefs allows competing ones that we could quite easily accept. Such a perspective is of paramount importance in developing any kind of useful or satisfactory approach to conflicts problems. Such problems are, as you now know, the most likely to force us to see our solutions as only one of at least two, any one of which could very easily be defended.

A very large part of our problems in this course arises from the fact that courts have been unable to achieve any kind of distance from the values that the judge holds or believes that the law represents. It is not sufficient for us to see this and to criticize. We have to realize that those ideas and those values are an important factor to be considered in any effort to make sense of the problems that we face. Of course, if those values are either irrational (in the sense that they are inappropriate to achieve what is intended by the person who holds them) or simply too absolute (in the sense that no compromise is possible) we will find that we have large problems of dealing in any useful way with them. We may have no choice but to accept that (maybe for the moment, at least) they represent the value that the court must forward or believe that it is forwarding.

The purpose of our investigation here are the same as in the first volume of these materials. You have to understand what the courts are doing, how they now reason and what the nature of the rules that they apply is. At the same time, we have to have an understanding of what it is that the rules are for and of how that goal can best be achieved. Once again, to talk of what the rules *should* be is not an idle academic pastime. It provides what is the only sound basis upon which to advise clients in anything but a clear case and the only possible way for helping your client if, in a "clear case", he or she is likely to end up with the short end of the stick. The actual problems that can arise are more exotic and extraordinary than any we could imagine. Often they present human dramas of the most moving kind, and the story of the parties' lives is a vivid reminder of what wars, passions and sheer bad luck can mean to the individual men, women and children affected. It hardly needs to be said that such problems present nearly insuperable difficulties for the law in reconciling all or even some of the conflicting pressures that must be acknowledged.

PART A

Chapter 1

Domicile

The concept of domicile is a connecting factor like the concept of the *situs* of property. The statement that a person is domiciled in a particular jurisdiction expresses a judgment or conclusion about the quality or extent of the person's geographical connection to a particular jurisdiction. In this respect the concept of domicile functions precisely like the concept of the proper law of the contract. As we shall see, the inquiry into domicile, again just like the inquiry into the proper law, focuses on such things as the person's factual connection with a particular jurisdiction; does he or she live there, work there, or intend to remain there?

The overt function of the concept of domicile is to identify a person's personal law. This personal law will, for certain purposes, identify the governing law for a particular issue before the court. Such an issue may be one of succession (to whom does a deceased's estate pass?), testamentary validity (Is the testatrix's will valid? How much of a deceased's estate can pass by will or under this will?), capacity to marry (Can this man marry this (or any) woman?) etc. It is important to realize that the determination that a person is domiciled in state X means that for the issue before the court (characterized, of course, as an issue that has a choice of law rule making domicile relevant) the law of state X governs. An inquiry into the purposes or content of the law of X (or of the competing jurisdiction Y) is logically irrelevant and unnecessary. The inquiry is only into the quality of the person's factual connection with X or Y.

The concept of domicile has an illusion of simplicity about it. It is, in fact, a complete set of rules, some of which we could describe as fairly functional, others as quite horrifyingly anachronistic. It is possible to examine the concept in the abstract since, as with most traditional conflicts rules, and has just been observed, those using the concept of domicile are formally unconcerned about either the result of the application of the rule or its purposes. That no sensible court is ever really unconcerned is, of course, inevitable. But because many judges feel that they cannot openly disagree with the commonly accepted rules, we have the usual manipulation of non-functional concepts. As you read the cases in this section, concentrate on learning the rules. Regard the rules as you would the rules of chess or of some child's game.

The extensive use of the concept of domicile is a feature of the common law. In

civilian systems the concept of citizenship or the *lex patriae* is more likely to be used. Texts on conflicts in those systems would discuss the problems of citizenship: its acquisition and loss. The notion of a *lex patriae* as a useful connecting factor is only likely to be a natural way of thinking in a unitary state. In a federal state like Canada, Canadian citizenship does not provide, by itself, an unequivocal reference to a particular legal system of provincial law. Domicile is, therefore, a more appropriate concept in a federal state. It was, historically, more appropriate in the days of the British Empire, for that institution presented many of the same features as a federal state. It was only comparatively recently that the U.K. Parliament was forced to consider much more carefully than before the concept of citizenship and the relation between Colonial citizenship and U.K. citizenship.

We can no more reject the concept of domicile outright than we could reject the concept of a background legal system against which the parties have conducted their negotiations in some contracts cases. The sensible solution to some contracts problems required the determination of this background. We needed to know the particular background of the contract because the contracts inquiry made such an investigation necessary. In the same way we need the idea of a personal law in some family cases and there is nothing, in principle, that should prevent us using the concept of domicile to identify this law. We have to be aware, however, of two factors. The first is that the use of the concept must never be allowed to obscure the real nature of our inquiry: viz., what justification there is for the application of any particular rule in any particular case? The second is that the traditional rules for determining a person's domicile often operate in ways that virtually preclude the possibility of the rational justification for the application of a particular rule.

The cases that we will now examine are a selection of those that set out the traditional Anglo-Canadian rule. The justification for the application for the concept in particular cases will be discussed later. Recent Ontario legislation has removed some anomalies regarding the domicile of married women, but the remaining common law rules are curious enough to satisfy the longings of the weirdest imagination. The common law rules remain unchanged in Nova Scotia. The common law rules that provide the basis for the discussion in the cases that follow are the following:

1. Domicile of Origin

A person acquires, at birth, a domicile of origin. At common law, a person's domicile of origin was determined, if he or she were legitimate, by the domicile of his or her *father*. If a person was illegitimate that person's domicile of origin was determined by the domicile of his or her *mother*. (At common law, a bastard

was, *filius nullius*, the son of no *man*, and so could not acquire his (or her) father's domicile.) A person's domicile of origin is fixed for life: it is as immutable as the physical place where birth occurred.

2. Domicile of Dependence

A child started life with a domicile of origin. The domicile of origin could not be changed but a child could acquire a new domicile if, again in the typical case, his or her father acquired a new domicile during the child's minority. A child, whose domicile of origin is, say, Ontario, can acquire a new domicile in, say, British Columbia, if his or her father acquires a new domicile there. In general, a child's domicile is the same as and changes with that of the person on whom he or she is regarded as being dependant. There are special problems in determining the domicile of those who are not mentally competent and of married women. The former class of special problems can be ignored: we shall examine the latter in a moment.

3. Domicile of Choice

After a person reaches the age of majority he or she is capable of acquiring a new domicile for himself or herself. A domicile of choice is acquired by (a) residence, or, at least, physical presence in the relevant jurisdiction, and (b) the requisite intention to remain in that jurisdiction. We will examine what the elements of the requisite intention are in a moment. A person on attaining the age of majority has, one moment before that momentous event, a domicile of dependence on his or her father (or, in special cases, his or her mother), one moment after that event the person has the capacity to acquire his or her own domicile. The person's domicile will remain what it was until the person actually acquires a new domicile of choice or, if the person is already living in some jurisdiction other than that in which his or her domicile of dependence placed him or her, and has the requisite intention to remain, will immediately be changed to the new jurisdiction. A man who has dependents and who changes his domicile will automatically change his dependents' domicile as he changes his own. At common law, only a widow or the mother of an illegitimate child could change her children's domicile in the same way a man could. Even in these cases there are problems: *Re Beaumont,* [1893] 3 Ch. 490. Relying on that case, Castel says: (2nd ed. p. 87, footnotes omitted)

> After the father's death, the child's domicile will generally follow a change in the mother's domicile. The exercise by the mother of her power to change the domicile of the child is only effectual where the change is for the benefit of the child. . . .

There is no such proviso in any statement of the power of a man to change the

domicile of his dependent children.

The following cases focus on the question of the intention necessary to acquire a domicile of choice. We will only examine fairly recent Canadian cases, but the strength and pervasiveness of the English heritage can be clearly seen. The cases sufficiently indicate the general approach of the English cases. It is worthwhile to set out here some of the leading cases and some of the more recent English authorities because they are probably still relevant in Canada, though, as we shall see, the Canadian cases are in some confusion.

Bell v. Kennedy (1868), L.R. 1 Sc. & Div. 307 (H.L.).

Winans v. A.-G., [1904] A.C. 287 (H.L.).

Ramsay v. Liverpool Royal Infirmary, [1930] A.C. 588 (H.L.).

In re Flynn, [1968] 1 W.L.R. 103 (Ch. D.).

In re Fuld, [1968] P. 675 (P.D.).

In each of these cases there is an exhaustive review of the lives of the people whose domicile was in issue. These stories often make interesting reading. Fans of *People* magazine will enjoy Lord Macnaghten's judgment in *Winans* and that of Megarry J. in *In re Flynn*, the former for the story of an eccentric American millionaire in the latter part of the nineteenth century, the latter because it is a biography of the actor, Errol Flynn, who was described by the judge at one point as a "sexual athlete of Olympic proportion".

The following cases are important in the development of the Canadian rules. The cases preceded the 1968 reform of the Canadian law of divorce. At the date of each of them the relevant legislation under which divorces were granted was, so far as the provinces west of Ontario and east of Quebec (except for Newfoundland) were concerned, provincial. Until 1967 when Parliament passed the *Divorce Act* there was no general legislation covering divorce for all of Canada. The rules applied in the Western Provinces was *English* legislation: the *Matrimonial Causes* Act, 1857. That legislation had effect in those provinces because their reception of English law (actually the date on which the legislatures for those colonies acquired the power to replace the existing law, English law, with their own) when they became self-governing colonies occurred after that legislation had been passed in England. (Ontario had no legislation providing for judicial divorce until 1930 when the federal parliament made the English act of 1857 applicable to it: Québec and Newfoundland had no judicial divorce until 1968 when the 1967 Act took effect. For people domiciled in Ontario before

1930 or in the latter two provinces before 1968, the only method for obtaining a divorce was by a private act of the federal parliament. Nova Scotia and New Brunswick had had divorce legislation that preceded Confederation and that jurisdiction persisted until it was replaced by the 1967 Act.)

Gunn v. Gunn
(1956), 2 D.L.R. (2d) 351 (Sask. C.A.)
(Martin C.J.S., Gordon, Procter, McNiven and Culliton JJ.)

The judgment of the Court was delivered by

GORDON J.A.: — This is an appeal from the judgment of Davis J. [1 D.L.R. (2d) 360] dismissing an action brought for the dissolution of the plaintiff's marriage with the defendant on the ground of infidelity. The learned trial Judge dismissed the action on the ground that the plaintiff had not established that the domicile of the male defendant was in this Province at the time the action was brought. The learned trial Judge further held, however, that had he jurisdiction he would not grant the order because, in his opinion, the plaintiff deserted the defendant without cause and that her conduct was the cause of the adultery complained of. The importance of this case, however, rests upon the first ground of dismissal, which is the main ground of appeal.

The facts are clear and uncontradicted because the male defendant himself was not only examined for discovery, but appeared and gave evidence at the trial. He was born in the City of Winnipeg in the Province of Manitoba. He first came to Saskatchewan in May of 1949. He was then in the employ of the Famous Players Canadian Corp. at Winnipeg, but had also worked at Fort William. This company has a chain of movie theatres across Canada. He came to Regina where he was appointed manager of the Metropolitan Theatre. He was later appointed manager of the Capitol Theatre, another theatre owned and operated by the Famous Players. He came to Regina of his own volition; he was not ordered here by the company. I understand that it was a promotion for him. His mother is in a Nursing Home in the City of Winnipeg, but his father is dead. His only trips to Winnipeg have been on business or to see his mother. He has not spent a vacation in Winnipeg since coming to Saskatchewan. The learned trial Judge quoted the facts as follows [pp. 361-2]:

> He quite frankly states that if he were offered a better position elsewhere with the Corporation he would take it. He has no assets in the Province of Saskatchewan and, so far as the evidence indicates, no ties here other than his position. It is not possible to predict how long the defendant will remain in Regina. He might be here for many years or a better position may become available at any time and he might well move to another Province.

The learned trial Judge then states as follows:

was *Trottier v. Rajotte*. That was an appeal from the courts of Quebec but the cases referred to by Mr. Chief Justice Duff were the leading English cases of the nineteenth century. *Trottier v. Rajotte* was also a case involving a change of domicile from a Canadian province to one of the states of the United States. This point was behind the reasoning of Mr. Justice Gordon in *Gunn* when he pointed out how insignificant was a change of domicile from one province to another (at least, particularly so between Manitoba and Saskatchewan when the same divorce law could be applied in both).[17] It could therefore be argued that *Trottier v. Rajotte* should not be regarded as authority when the change of domicile occurs within Canada. *Gunn* attempted to reconcile *Trottier v. Rajotte* with the view of Vice-Chancellor Kindersley in *Lord v. Colvin*, but even so, the authority for the latter view is weak, to say the least. Both *Gunn* and *Osvath-Latkoczy* may be regarded as *per incuriam* judgments since neither court was aware of what had happened in *Moorhouse v. Lord*. In any case, *Osvath-Latkoczy* by ignoring *Trottier v. Rajotte* is weak authority, and could clearly be reconsidered by the Supreme Court of Canada, though, as has been suggested, *Trottier v. Rajotte* could be distinguished. The law at the moment would therefore appear to be that the most recent pronouncement of the Supreme Court of Canada, *Osvath-Latkoczy*, should govern in cases where the change of domicile is between Canadian provinces,[18] but that in other cases, *Trottier v. Rajotte* has either to be reconciled with *Osvath-Latkoczy* (a difficult task) or else got out of the way by being distinguished, or regarded as no longer good law. It is clear, at least that no court can ignore the contradictions between *Osvath-Latkoczy* and *Trottier v. Rajotte*, and it is to be hoped that the Supreme Court of Canada will soon clarify the law.

NOTES

1. The traditional English view of the intention necessary to support the acquisition of a domicile of choice was based on the belief that it was nearly incomprehensible that an Englishman would ever want to change his domicile to some other jurisdiction. The cases already mentioned where the rule was laid down with uncompromising severity were, however, a case involving an American, *Winans v. A.G.*, [1904] A.C. 287, and a Scotsman, *Ramsay v. Liverpool Royal Infirmary*, [1930] A.C. 588.

2. As you will have noticed, the concept of domicile is independent of the purpose for which it is being used. The most obvious fact to demonstrate this statement is that texts like *Dicey & Morris*, *Cheshire and North* and *Castel*

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[17]This view may be contrasted with the view that a domicile of choice can be lost more easily than a domicile of origin. See, *Re Flynn*, [1968] 1 All E.R. 49. The only comment that can be made is, why?

[18]The 1968 *Divorce Act* makes inter-provincial changes of domicile far less important. Such changes are now only important in cases of succession or, possibly, some aspects of capacity, e.g. capacity to marry or to make a will.

discuss the concept at the beginning of their works and nothing turns on the issue before the court. This placing of the discussion in those texts indicates that the concept can be "factored out" of the cases where it is applied and treated like an all-purpose tool, equally well adapted to dealing with the question whether a particular court is the appropriate court to dissolve a marriage or whether a person's estate should go as his or her will directs or as some rule restricting testamentary capacity should direct.

3. It is significant, for example, that *Winans* was a tax case (many of the English cases are tax cases: liability to British tax being based on domicile rather than residence) and the deceased's liability to tax depended on his being domiciled in England. The House of Lords held against the taxing authority. In *Ramsay* the validity of a gift by will to a charity depended on the deceased's dying domiciled in Scotland. The House of Lords held in favour of the charity. To what extent are the issues the same as those raised where the court has to determine whether one Canadian court can properly hear a petition for divorce? The English courts are not immune to the pressures to reach sensible decisions and, to take two cases out of many, *May v. May*, [1943] 2 All E.R. 146, and *Cruh v. Cruh*, [1954] 2 All E.R. 545, suggest that the courts are in practice concerned about the effects of their decisions. You must keep the purpose of the inquiry into a person's domicile firmly in mind as you read the cases.

4. The three domicile cases we have studied thus far, *Gunn*, *Stephen* and *Osvath-Latkoczy*, arose out of moves persons made in connection with their employment. Either they moved from one jurisdiction to another in order to take up a new job or their existing employment required them to re-locate. What about the situations where persons reside (*i.e.*, sleep, watch television, spend weekends) in one jurisdiction but work in another? Traditionally the domicile would be the former jurisdiction, however a recent case indicates that the importance of the employment relation must not be overlooked: *Re Urquhart Estate* (1990), 74 O.R. (2d) 42 (High Ct.) was a complicated case in which the court had to decide whether the deceased had at the time of his death been domiciled in New Zealand, Ontario, Québec, Florida or New York. The head office of his employer was in Kanata, Ontario and while working there he resided either with friends in Ottawa (where he paid no rent) or at one of a number of properties he owned in Québec. His employment had taken him to Florida and at the time of his death he had been living there several years. In finding that the deceased had died domiciled in Ontario, Austin J. put considerable emphasis on the fact that his employer was based there and that the deceased's principal attachment was to his job. He wrote: (at 53)

> It is argued that the time spent in Québec and the property bought there are inconsistent with either residence or intention respecting Ontario. In my view, this is not the case. What is overlooked by that argument are the proximity,

convenience and attraction of the Gatineau area in general and Wakefield, Kirk's Ferry and Larrimac in particular. Urquhart was a worker and a very gifted on by all accounts. He worked long hours. His work was in Ottawa and Kanata. On the evidence, I must find that he spent weekends and holidays at various properties in Québec, some owned, some rented, some just visited, but Ottawa was where he "lived". I find that Urquhart had established a domicile of choice in Ontario by the summer of 1980.

5. It would not be hard to raise all kinds of awkward questions involving the application of the common law rules of domicile. The exams set by Conflicts teachers years ago are full of them. The judgments that you have just read are all too typical of Canadian judging. No effort is made, even by the Supreme Court, to consider its own previous judgments, and, as you can see, the law is inconsistent and unpredictable.

6. The next case establishes one of the most startling propositions of the common law. The case deals with what must be a common occurrence in individuals' lives, that is when a person (*ex hypothesi* an adult male or an unmarried adult woman) leaves a domicile of choice with no intention of returning; where one, so to speak, shakes off the dust of that domicile from one's feet. It is an axiom of the common law that no one can be without a domicile, so what is to happen when a person leaves a domicile of choice with no intention of returning or, possibly intending never to return? It is this question that the next case answers.

Udny v. Udny
(1869), L.R. 1 Sc. & Div. 441 (H.L.)
(Lord Hatherley L.C. and Lords Chelmsford, Westbury and Colonsay)

The late Colonel John Robert Fullerton Udny, of Udny, in the county of Aberdeen, though born at Leghorn, where his father was consul, had by paternity his domicil in Scotland. At the age of fifteen, in the year 1794, he was sent to Edinburgh, where he remained for three years. In 1797 he became an officer in the Guards. In 1802 he succeeded to the family estate. In 1812 he married Miss Emily Fitzhugh, — retired from the army, — and took upon lease a house in London, where he resided for thirty-two years, paying occasional visits to Aberdeenshire.

In 1844, having got into pecuniary difficulties, he broke up his establishment in London and repaired to Boulogne, where he remained for nine years, occasionally, as before, visiting Scotland. In 1846 his wife died, leaving the only child of her marriage, a son, who, in 1859, died a bachelor.

Some time after the death of his wife Colonel Udny formed at Boulogne a connection with Miss Ann Allat, which resulted in the birth at Camberwell, in Surrey, on the 9th of May, 1853, of a son, the above Respondent, whose parents were undoubtedly unmarried when he came into the world. They were,

> The application of these general rules to the circumstances of the present case is very simple. I concur with my noble and learned friend that the father of Colonel Udny, the consul at Leghorn, and afterwards at Venice, and again at Leghorn, did not by his residence there in that capacity lose his Scotch domicil. Colonel Udny was, therefore, a Scotchman by birth. But I am certainly inclined to think that when Colonel Udny married, and (to use the ordinary phrase) settled in life and took a long lease of a house in Grosvenor Street, and made that a place of abode of himself and his wife and children, becoming, in point of fact, subject to the municipal duties of a resident in that locality; and when he had remained there for a period, I think, of thirty-two years, there being no obstacle in point of fortune, occupation, or duty, to his going to reside in his native country; under these circumstances, I should come to the conclusion, if it were necessary to decide the point, that Colonel Udny deliberately chose and acquired an English domicil. But if he did so, he as certainly relinquished that English domicil in the most effectual way by selling or surrendering the lease of his house, selling his furniture, discharging his servants, and leaving London in a manner which removes all doubt of his ever intending to return there for the purpose of residence. If, therefore, he acquired an English domicil he abandoned it absolutely *animo et facto*. Its acquisition being a thing of choice, it was equally put an end to by choice. He lost it the moment he set foot on the steamer to get to Boulogne, and at the same time his domicil of origin revived. The rest is plain. The marriage and the consequences of that marriage must be determined by the law of Scotland, the country of his domicil.
>
> [The other law lords agreed in the result.]

NOTES

1. It should be apparent now that whatever functional basis the concept of domicile may have at its core, at the periphery it is nothing more than some arcane game that conflicts cognoscenti play for amusement when they have nothing better to do with their time. It is merely an unfortunate consequence of no particular significance that individuals' lives get caught up in these games.

2. The consequence of the decision in *Udny v. Udny* was that the respondent was saved from the awful consequences of bastardy (and it is an interesting side-light to the case that following the House of Lords' decision the respondent brought suit against the appellant for having alleged that the respondent was a bastard). We cannot easily tell how much force this result might have had in moving the court to the conclusion it reached. By that date the attitude of the common law to legitimation *per subsequens matrimonium* was becoming hard to defend. Legitimation, that is the becoming legitimate by one's parents' marriage after one's birth, had been known to the civil law systems (through the canon law) for about a thousand years. The attitude of the common law was supposed to have been fixed by the Parliament of Merton in about 1250 when the barons were alleged to have cried with one voice, "Nolumus leges Angliae mutare", when it was suggested by the bishops that legitimation *per*

subsequens matrimonium be allowed. The common law remained unchanged until 1926—ample time for a second thought!

3. The American rule was never the same as *Udny v. Udny*. Then a domicile of choice persisted until a new domicile of choice was acquired. To Lord Westbury's question, ". . . is it meant to be said that [a natural-born Englishman] carries his Dutch domicile, that is, his Dutch citizenship, at his back, and that it clings to him pertinaciously until he has finally set up his tabernacle in another country?" the American answer is that it is certainly no less absurd (and probably a good deal more absurd) to have a domicile of origin revive than to have a domicile of choice persist. The latter is at least likely to have been one chosen by the person rather than one assigned to him or her at birth. The American case is *In Re Estate of Jones* (1921), 182 N.W. 227. The court in that case explains the English view on the ground that it fitted in well with nineteenth-century English views of what was only right and proper: it "was a recognition of the desire on the part of the English trader in distant lands to have his estate administered according to the laws of the land of his birth."

4. At common law the domicile of a child was the same as and changed with that of his or her father, though in exceptional cases it could depend on the child's mother. A married woman's domicile was the same as and changed with that of her husband. *There were no exceptions to this rule.* The proof of the truth of this statement is provided in the following decision of the Privy Council.

Attorney-General for Alberta v. Cook
[1926], A.C. 444 (P.C.)
(Viscounts Cave, Haldane and Dunedin and
Lords Shaw, Phillimore, Blanesburgh and Merrivale)

[This appeal arose in a petition for divorce brought by a woman in Alberta. As in *Gunn*, *Osvath-Latkoczy* and *Stephen*, the question of domicile became relevant in *Cook* because at the time the case was heard domicile within the province was the only ground on which a Canadian court might take jurisdiction to grant a divorce. In *Cook* the petitioner was a woman who had been granted a decree of judicial separation from her husband and sought a divorce before the courts of Alberta, her residence of four years. At trial it was found that her husband's domicile (and therefore hers) was Ontario, and her suit was dismissed. Her appeal to the Appellate Division was successful. The Alberta Attorney-General, who had intervened in the Appellate Division, appealed to the Privy Council. The judgment of their Lordships was delivered by LORD MERRIVALE. After taking note of the wife's argument that women who have received decrees of judicial separation from their husbands should be permitted to have their own separate domicile he continued:]

Lord Cave said: [*Lord Advocate v. Jaffrey*, [1921] 1 A.C. 146, 158.]

> is thereby qualified to choose an independent domicil. A husband may be, and sometimes has been, a suitor for judicial separation for cruelty or for adultery. Assuming ss. 25 and 26 to have the suggested effect with regard to domicil, it would seem to follow that a guilty wife judicially separated may by virtue of domicil acquired in a foreign jurisdiction become entitled to cite her husband to answer there a suit for divorce upon grounds sufficient by the local law but unknown in the law of his domicil. The marriage of British subjects would thus become liable to dissolution by authority to which they owe no obedience.
>
> The contention that a wife judicially separated from her husband is given choice of a new domicil is contrary to the general principle on which the unity of domicil of the married pair depends; divorce *a mensa et thoro* gave no such right; and the statute of 1857 was not framed with that intention and does not effect that purpose.
>
> Under British law one of the effects of marriage is to give to the spouses a common domicil—the domicil of the husband. Within the jurisdiction thereby arising, and by the marriage laws to which the spouses are there subject, the claims of either of them to a decree of dissolution of marriage ought to be determined. In so far as British tribunals are concerned it is a requisite of the jurisdiction to dissolve marriage that the defendant in the suit shall be domiciled within the jurisdiction. In such cases actor sequitur forum rei. This is the true effect upon the present proceedings of the rule laid down in *Le Mesurier v. Le Mesurier*, [1895] A.C. 517.
>
> The appeal of the Attorney-General succeeds. There will be no order as regards costs.

NOTES

1. Notice the authorities relied on by Lord Merrivale. Mrs Cook would, no doubt, have felt that the views of the Emperor Justinian who lived in the early 6th century A.D. (Justinian was the moving force behind the *Digest* which was completed in 533), Bracton (who died in 1268) and Littleton (who died in 1481) were particularly relevant in Alberta in the twentieth century. One may doubt that she thought much more of the views of Coke (who died in 1633) or Blackstone (who died in 1780).

2. The *Family Law Reform Act, 1978* changed the rules of the common law regarding the domicile of a wife. The *Family Law Act* R.S.O. 1990, c. F.3, provides:

> 64(1) For all purposes of the law of Ontario, a married person has a legal personality that is independent, separate and distinct from that of his or her spouse.
>
> (2) A married person has and shall be accorded legal capacity for all purposes and in all respects as if he or she were an unmarried person and in particular has the same right of action in tort against his or her spouse as if they

were not married.

(3) The purpose of subsections (1) and (2) is to make the same law apply, and apply equally, to married men and married women and to remove any difference resulting from any common law rule or doctrine.

3. The law in England was changed in 1974: *Domicile and Matrimonial Proceedings Act*, 1973, s. 1. Not all provinces have changed the common law rules. British Columbia and Nova Scotia, for example, have not yet changed the common law rules.

4. Now that *Morguard* has "constitutionalized" the conflict of laws what do you think of the chances of a challenge to the common law rule of domicile under s. 15 of the *Charter*? A recent paper, Acorn, "Gender Discrimination in the Common Law of Domicile and the Application of the Canadian Charter of Rights and Freedoms" (1991), 29 *Osgoode Hall Law J.* 419, explores this argument.

5. The rules for determining the domicile of children were changed at the same time: the *Family Law Act* provides:

67. The domicile of a person who is a minor is,

(a) if the person habitually resides with both parents and the parents have a common domicile, that domicile;

(b) if the minor habitually resides with one parent only, that parent's domicile;

(c) if the minor resides with another person who has lawful custody of him or her, that person's domicile; or

(d) If the minor's domicile cannot be determined under clause (a), (b) or (c), the jurisdiction with which the minor has the closest connection.

6. The *Divorce Act* does not use the concept of domicile: residence of the petitioner or respondent being the only factor determining the power of a court to take jurisdiction to dissolve a marriage.

7. The Parliament of Canada has not changed the rules regarding a woman's domicile. We believe that it is possible, though probably unlikely, that the common law rules might be applied to determine a woman's capacity to marry—a matter under the federal power over "marriage and divorce".

8. It is with some small sense of regret that, in Ontario at least, it is

no longer necessary to explore the full consequences of the common law rules regarding a married woman's domicile. We use the word "regret" deliberately because the rules are among the most brutal and unfair of all the rules that the judges applied to women and we should not forget this fact. The rule gave rise to a number of cases that are among the saddest vignettes of Victorian (and later) English social history. They include cases where the problems of widows' domiciles are discussed. A representative one is *In re Raffenel* (1863), 3 Sw. & Tr. 49; 164 E.R. 1190. Similar problems arose in *Re Wallach*, [1950] 1 All E.R. 199, and *Re Scullard*, [1957] Ch. 107; [1956] 3 All E.R. 898 (Ch. D.)

9. As has been stated, the concept of domicile relates a person to a territorial unit: a person is domiciled in Ontario, England etc. Ontario is a province of a larger federation, Canada. For certain purposes it was important that a person be domiciled in Canada rather than Ontario. The jurisdictional requirements of the *Divorce Act*, 1968, were that the petitioner be domiciled in Canada and resident in the province in which the petition was brought. For other purposes (principally succession to movable property) a person must be domiciled in Ontario for Ontario law to be applicable. The issue before the court determined whether the tests required are applicable to a Canadian or a provincial domicile. The possibility existed, and may even now still exist, that while a person who has an Ontario domicile must be domiciled in Canada, a person domiciled in Canada might have no provincial domicile. An immigrant who comes to Canada intending to remain may have the necessary intention to stay in Canada, but be unsure of what province he or she wants to live in, and, therefore, be unable to have the necessary intention to acquire a domicile in a province.

10. It was an axiom of the common law that a person could only have one domicile. The possibility of a person having a Canadian and provincial domicile was regarded as an exception to this axiom, and learned articles were written on it: Cowen and Mendes da Costa (1962), 78 *Law Quarterly Rev.* 62; Mendes da Costa (1968), 46 *Can. Bar Rev.* 252. There is nothing particularly startling about a person having two domiciles in the sense discussed above, for it simply reflects the fact that Canada is a federation. Only an English perspective regards the possibility of two domiciles as unusual.

11. Some further problems should be mentioned. Problems of domicile occasionally arise when the person in question is an illegal immigrant to Canada. The question is whether such a person can acquire a domicile here. The better view (i.e., the view that is more likely to be accepted than its opposite) is that the question of a person's common law domicile is independent of his or her status under Canadian immigration laws: *Jablonowski v. Jablonowski*, [1972] 3 0.R. 410, cf. *Bednar & Bednar v. Deputy Registrar General of Vital Statistics* (1960),

24 D.L.R. (2d) 238.

12. A curious problem has recently arisen under the *Personal Property Security Act*. In *Re Dominicus Henricus Johan Haasen* (1992), 8 O.R. (3d) 489, (Ont. Ct. (Gen. Div.) in Bankruptcy, Farley J.) the question concerned the effectiveness of a registration under the *PPSA* against a person. The name of the person on his birth certificate was in the form given in the style of cause. The registration was made in the name of "Dominic J. Haasen." The regulations under the *PPSA* require that a registration against an individual be made using his or her first name, middle name or initial (if any) and surname. Farley J. held that a registration against an individual to be valid had to comply with the *Vital Statistics Act*, R.S.O. 1990, c. V.4, and use the name on the person's birth certificate. What if the person does not have an Ontario or Canadian birth certificate but has one from a country that has a very different system of personal nomenclature, or has no birth certificate? Would we use the concept of the domicile of origin as a solution? Would you like to advise the loans officer of a branch of a major bank what the domicile of origin of all the branches borrowers might be? Do you think that you could readily get sufficient information to give any useful advice in anything but the simplest cases? What might a solution look like?

13. We saw in *Stephen v. Stephen* that special problems can arise in the case of a member of the armed forces. An example of the courts' attitude to domicile, or more accurately, to a change of domicile is provided by *Wilton v. Wilton*, [1946] 0.R. 117; [1946] 2 D.L.R. 397. Such cases are really extraordinary and completely unjustifiable in a federal state. To require a high standard of proof for a change of domicile is simply silly for really very little depends on it. It seems that there is a real risk that we cannot escape the attitude of nineteenth century English judges and their xenophobia and chauvinistic patriotism.

14. The next case is an example of how the traditional rules for determining a person's domicile are applied. Is it only by coincidence that the result might make sense? Try to play the game with the degree of detachment that the true domicile aficionado requires for full enjoyment.

Harrison v. Harrison
[1953] 1 W.L.R. 865, (P.D.A. Collingwood J.)

Undefended petition for divorce.

The respondent husband was born in England on June 18, 1930, of English parents domiciled in England. In 1948 his parents emigrated to South Australia, but the respondent remained in England. After serving a short period in the

PART B

MARRIAGE

Chapter 2

Introduction

We all think that we know what marriage is for and what the consequences of marriage are. A brief study of the conflicts cases on marriage should quickly convince us that here "certainty generally is illusion and repose is not the destiny of" anyone. For every case where the application of one rule appears to make sense, another case can easily show that the rule cannot now be sensibly applied. As you would by now expect, the result is that the cases and the law are in some confusion. This, however, does not mean that there are not principles that can be discovered and used. The problems of understanding the issues of marriage arise from the fact that in our society the presence or absence of a marriage can have an impact on the legal issues in an extraordinarily wide range of situations. The following list includes some of the more obvious examples of the importance of marriage:

1. Rights of support.
2. Legitimacy of children.
3. Rights of succession.
4. Tax (attribution, deductions).
5. Criminal law (bigamy, accessory after the fact).
6. Torts (interspousal immunity).
7. Evidence (non-compellability of spouse and privilege).
8. Immigration (family class applicant).
9. Rights under insurance policies.

We tend to think of marriage in the abstract, i.e., we ask "Is this person married?" or, "Is Tom married to Mary?" We naturally assume that an affirmative answer to either question will automatically result in there being an

obvious answer to the issue of the relevance of marriage in any of the examples that we have listed. In other words, we assume that if Tom is married to Mary, then Tom can get maintenance from her, that he cannot be compelled to testify against her and that his income may be attributed to her under the *Income Tax Act*. This approach is sometimes dignified by saying that marriage creates a *status*.

If we were to think about the issues that have been listed in ways that did not involve the notion of status, we might conclude, for example, that the answer given to the question of whether Mary should support Tom (or *vice versa*) might not necessarily conclude the issue of whether she should be compelled to give against him at a criminal trial. The courts are, as usual, not unaware of these issues, and they sometimes struggle to reach sensible results in the cases that come before them. Once we inject a conflicts issue the problems are both much more difficult and much more open to manipulation. An understanding of what is going on requires, therefore, a careful disentangling of the issues.

Provincial law has avoided many of the problems, that until quite recently, caused great difficulty. Thus, it is now no longer necessary for people to be married before one person can be compelled to support the other. See: *Family Law Act*, s. 29; *Family Maintenance Act*, R.S.N.S. 1989, c. 160, s. 2(m) and s. 3 (spouses, including those who have co-habited for longer than one year but are unmarried), s. 9 (dependent children), and s. 15 (dependent parents); *Family Relations Act*, R.S.B.C. 1979, c. 121, s. 56 (children), s. 57 (spouses which includes those who have co-habited for at least two years), and s. 58 (dependent parents). The impact of these changes is that it now becomes unnecessary to determine if there is a marriage before Mary can be compelled to support Tom, and this, in turn, means that some potential conflicts issues never get off the ground. Somewhat similar results occur in cases of succession, and, of course, Ontario law has now largely by-passed the perennial problem of the legitimacy of children. (*Children's Law Reform Act* (*CLRA*) R.S.O. 1990, c. C.12, s. 1). In spite of this, the problem of marriage as a status remains, and it is, therefore, necessary that we be able to answer the questions that arise in this situation. As you read the cases, however, keep clearly in mind what the real issues are. The typical issues are likely to be one of the following:

1. Can this man be compelled to support this woman or this child?

2. Can this woman succeed to this man's estate as his widow?

3. Is this child the legitimate child of this man?

4. Is this woman validly married to this man, given that she went through a

ceremony with another man beforehand?

You will have to consider how well the judgment has responded to the need to find a satisfactory resolution of the issues.

One further general problem should be mentioned. The common law (i.e., the law apart from recent acts like the *FLA* and the *Succession Law Reform Act*, R.S.O. 1990, c. S.26, (*SLRA*), generally speaking, ignored any relationship between a man and woman that was neither that of parent and legitimate child nor husband and wife. Thus a woman's rights to support depended entirely on the fact of a valid marriage. Similarly, only a wife could claim to be entitled to the privileges given by the law of evidence: (*Ex p. Coté* (1971), 22 D.L.R. (3d) 353.) The consequence was that there was a strong pressure to hold that there was a valid marriage. So strong was this presumption that the existence of a marriage would be assumed from long co-habitation alone. Thus in the common law system, most problems could be more satisfactorily sorted out by holding the parties to be validly married than by regarding them as unmarried. The conclusion that there was no marriage would generally mean that reliance would go unprotected, that an estate would be disposed of in ways that probably would not represent the intentions of the deceased, or that the integrity of a relationship would be violated by the forced disclosure of private communications.

The importance of there being a valid marriage is still with us and can arise in unexpected places. In *Miron v. Trudel* (1991), 83 D.L.R. (4th) 766, (Aff'g, (1990), 71 O.R. (2d) 662, 65 D.L.R. (4th) 670, 45 C.C.L.I. 296, [1990] I.L.R. ¶1-2551) (Ont. C.A., Morden A.C.J.O., Griffiths & Osborne JJ.A.) it was held that the word "spouse" in the standard automobile policy (Section B, Subsection 2, Part II and Section B, Subsection 3) means a Grade "A" spouse, one married in a valid ceremony and in compliance with the rules to be discussed, and not a "common law" spouse. It is interesting and a vivid commentary on both the judgment of the Court of Appeal and contemporary values that the *Insurance Act* was amended (S.O. 1990, c. 2, s. 39) to broaden the definition of spouse. It now provides, *Insurance Act*, R.S.O. 1990, c. I.8, s. 224(1):

> "spouse" means either of a man and a woman who,
>
> (a) are married to each other,
>
> (b) have together in good faith entered into a marriage, or
>
> (c) are not married to each other and have cohabited continuously for a period of not less than three years, or have cohabited in a relationship of some permanence if they are the natural or adoptive parents of a child.

It is important to realize, however, that there was nothing inevitable about the approach of the Court of Appeal—which had, of course, to be legislatively reversed. It has already been suggested that quite different questions could be asked in the course of resolving the issues that have been mentioned. The analysis of some conflicts cases discloses that civil law jurisdictions, for example, may attach far less importance to marriage in that rights of support and succession may arise from a putative marriage, a supposed or reputed marriage, i.e., a marriage that is invalid as a marriage but which is, nonetheless treated for certain purposes as a valid marriage. In those jurisdictions, the determination of the status of the parties, therefore, may not dispose of the issue of support. Here we have the same kind of problem that we touched on in *Charron v. Montreal Trust*, (Vol. I, p. 92). We have to be constantly aware of the fact that each legal system has an integrity of its own. Each will sort out, for example, the problem of the support of wives and children in roughly similar ways. The common law imposes obligations of support on a husband. It makes marriage easy and has a strong presumption in favour of the validity of any marriage. The common law approach can be seen, of example, in the following provision of the Ontario's *Marriage Act*, R.S.O. 1990, c. M.3:

> 31. If the parties to a marriage solemnized in good faith and intended to be in compliance with this Act are not under a legal disqualification to contract such marriage and after such solemnization have lived together and co-habited as man and wife, such marriage shall be deemed a valid marriage, although the person who solemnized the marriage was not authorized to solemnize marriage, and despite the absence of or any irregularity or insufficiency in the publication of banns or the issue of the licence.

Some provinces include presumptions as to the validity of certain marriages in their evidence statutes: *e.g.*, *Evidence Act*, R.S.N.S. 1989, c. 154, s. 42(2). The civil law permits a woman to make a claim on the basis of a putative marriage. The civil law can, therefore, make it much more difficult to get married because the effects are not quite so drastic as they would be in a common law setting.

We shall see that serious problems arise when we mix incompatible regimes. It can be argued, for example, that the first case we shall look at sent the Anglo-Canadian courts off in a fundamentally wrong direction because in an unacceptable way, the court mixed the civil and common law approaches to marriage. Later cases show that the courts simply could not live with that approach. The problems are all intensified when we add in the problem of divorce. It is sufficient to note here that, as a very general proposition, it appears to be true that the more readily available divorce is, the more readily parties can be held to be married. The more difficult divorce is, the more impediments there are to a valid marriage. The formal prohibition of divorce has, for example, never prevented people from getting out of unsatisfactory relations provided that they had enough money or power (e.g. Henry VIII).

One final point to remember is that people generally regard marriage as important. It is tied up with complex and pervasive ideas of religion, morality and biology. We do not have to investigate these issues here, but the courts' views on these issues are often the unstated premise of the judgments. Radically different ideas can be suggested, but in a very real sense they are little more than idle academic musings. Marriage is regarded by many people as too important to be made light of. Therefore, we can only carry a rational analysis to a certain point. At that point we are forced to concede that we cannot ignore that in Canada, for example, marriage is important and that certain legal consequences cannot be further argued about but must be accepted. The precise legal problem raised is that many of the rules we are forced to apply appear to be essentially purposeless. Any legal analysis is very difficult. The result is that the investigation of these problems is both interesting and difficult. It goes without saying that in many cases there are no easy answers and that we can properly disagree on how the problems should be resolved.

Note that in Ontario, a woman who is not married may succeed to the estate of a man with whom she lived only under the *Succession Law Reform Act*, which provides:

> 1(1)
>
> . . .
>
> "spouse" means either of a man and woman who,
>
> (a) are married to each other, or
>
> (b) have entered into a marriage that is voidable or void, in good faith on the part of the person asserting a right under this Act. . . .
>
> PART II INTESTATE SUCCESSION
>
> 45. Where a person dies intestate in respect of property and is survived by a spouse and not survived by issue, the spouse is entitled to the property absolutely.
>
> . . .

Note that there is no further extended definition of "spouse" under this Part.

PART V SUPPORT OF DEPENDENTS

57. In this Part,

"dependent" means

(a) the spouse of the deceased,

(b) a parent of the deceased,

(c) a child of a deceased, or

(d) a brother or sister of the deceased,

to whom the deceased was providing support or was under a legal obligation to provide support immediately before his or her death.

. . .

"spouse" means a spouse as defined in subsection 1(1) and in addition includes either of a man an woman who,

(a) were married to each other by a marriage that was terminated or declared a nullity, or

(b) are not married to each other and have cohabited,

1. continuously for a period of not less than three years, or

2. in a relationship of some permanence, if they are the natural or adoptive parents of a child.

58(1) Where a deceased, whether testate or intestate, has not made adequate provision for the proper support of his or her dependants or any of them, the court, on application, may order that such provision as it considers adequate be made out of the estate of the deceased for the proper support of the dependants or any of them. . . .

62(1) In determining the amount and duration, if any, of support, the court shall consider all the circumstances of the application, including,

. . .

(r) if the dependant is a spouse,

(i) a course of conduct by the spouse during the deceased's lifetime that is unconscionable as to constitute an obvious and gross repudiation of the relationship. . . .

We shall look more closely at some of the issues of succession later. For the

moment it is only important that you keep in mind that a marriage of some kind may be very important in issues of succession.

An excellent comparative analysis of twentieth-century trends in western marriage law can be found in Glendon, "Modern Marriage Law and its Underlying Assumptions: The New Marriage and the New Property" (1980), 13 *Family L.Q.* 441. Glendon points out that in the early part of this century a marriage generally lasted until the death of one of the spouses. Marriage was the institution within which procreation and child care were to take place, and thus (within a context where the male partner was generally the dominant earner and decision-maker) the wife and children of a "legitimate" marriage enjoyed a legal status superior to that of partners and offspring outside marriage. Within the last fifty years we have seen increasing recognition of informal marriage; *i.e.*, the recognition that cohabitation and procreation may legitimately take place without marriage, and the resulting tendency to treat matters such as support and child custody on a marriage-neutral basis. We have also seen the growing acceptance of divorce as an acceptable means of ending a marriage, with legal attention shifted from discouraging divorce to ensuring an acceptable division of the parties' property (including such "new property" as pension rights and licences).

Glendon says:

> As the subtitle of this paper indicates, an underlying assumption of the analysis offered here is that modern marriage law reflects not only changed marriage behavior, (the "new marriage"), but changes in the nature and forms of wealth (the "new property"). . . .
>
> The new marriage, American style, has two earners, mutually dependent on their combined sources of income, the wife earning less than the husband. The wife's earnings, though low, seem, together with her earning potential, to be a major factor that makes it easier for husbands as well as wives to depart from a marriage. Divorce has for some time been a "normal" method of terminating the new marriage. Although one must be careful about reading too much about actual marriage *stability* into reported divorce rates, the generally cautious U.S. Census Bureau demographers are now estimating that, at present rates, 30 to 40 percent of marriages now being formed will end in divorce. Since 3 out of 4 divorced persons remarry, the new marriage is often a subsequent marriage. . . .
>
> Naturally this particular variety of the new marriage puts a strain on the old support law. It is support law that has begun to give way, the former priority of the obligations to the earlier family yielding to the principle of equality of treatment among all children, legitimate or illegitimate, from earlier or later unions. In practice, however, the new family is often *preferred* to the old,

because there simply is not enough money to go around. In such cases, the state furnishes minimal subsistence directly to the old family, leaving its former provider free to voluntarily support the new family, typically at a higher level.

Finally, the new marriage may be informal as well as formal. The rise of informal marriage, together with that of births outside formal marriage, is symptomatic of a widening discrepancy between legality and legitimacy of the type that often accompanies the breakdown of old legal norms and their replacement with new ones. . . .

The intensity and rapidity of these changes in marriage and family behavior in the United States have put great stress on laws formulated in a different social context or for a different clientele. For example, they unsettle the assumptions on which marital property and inheritance law are based. The legal matrimonial property regime and the intestate succession law of any given country essentially strive to accommodate the needs of the typical couple or the typical decedent, respectively. That is, they are especially designed to be the law that applies if the persons affected do not make other arrangements (e.g. marital contracts or wills) to suit their individual circumstances within the limits permitted by public policy. The present dilemma is to know what is typical. The family type that was long *called* "typical", or "traditional" is the breadwinner-homemaker type with at least two children. At present, however, such units comprise a statistical minority among all household types. They are in fact fewer in number than the fastest-growing family type in the United States, the female-headed one-parent family, which by 1975 accounted for 13 percent of all families. The one-parent family is growing at ten times the rate of other families, and the major cause of its growth is divorce. It is said that, at present rates, nearly half of all American children (four out of ten) now being born will spend at least part of their childhood in such a household.

The information being gained about marriage in the early modern period from 1500 to 1800 is particularly interesting for present purposes. At that time, it seems that marriages were dissolved by death about as often as they are now dissolved by divorce. Indeed because of high mortality rates, about a third of all marriages did not last more than 15 years. Second marriages and reconstituted families were about as common as they are today. This has led Lawrence Stone, who has synthesized much of the new English and French work, to remark that, with increased longevity, modern divorce may be merely "a functional substitute for death."

In Stone's view, however, two facts stand out that distinguish the modern couple relationship. They are somewhat contradictory. One is that marriage, while it lasts, is more companionate, close and intense than in the past when, (as one of the French historians has put it), it was a "precarious link" between two blood lines. The second distinctive feature of modern marriage is that, even though it is more companionate and intense, it is also more perishable and unstable. If Stone's observations are accurate, it should not be surprising to see modern marriage law reflecting simultaneously both the intensity and the instability of the modern couple relationship where the principal bond is affective rather than economic. This indeed can be seen quite clearly by comparing the legal rights

> a spouse has in inheritance with those he or she has in divorce. Succession law, with its ever-increasing expansion of the rights of the surviving spouse at the expense of blood relatives reflects the decline of kinship and the companionate nature of those marriages (still a majority) that last until death. Divorce law, on the other hand, increasingly makes the divorced spouse responsible in principle for her own welfare, a natural consequence of the perishability of the modern couple unit and the rise in successive marriages while the prior spouses are still alive.

See also: Glendon, *The New Family and the New Property* (Toronto: Butterworths, 1981).

As you read the conflicts cases on marriage, divorce and matrimonial property, bear in mind that many of them were decided *before* this radical shift in the institution and legal attitude to marriage took place. It is an important and difficult question to decide whether such cases should still be relevant today.

Chapter 3

The Formalities of Marriage

A marriage to be valid in any legal system must comply with the law's requirements both as to its form and as to the capacity of the parties to it. As we shall see, there are problems of characterization here, but if we ignore these for the moment, we can say that there are two sets of tests that a marriage to be valid must meet. We shall investigate first the issue of the formal validity of a marriage.

In Canada, the provinces have power under the *Constitution Act* to legislate in respect of "The solemnization of marriage in the Province" (s. 92(12)). The federal Parliament has power in respect of "Marriage and Divorce" (s. 91(26)). Compliance with the requirements of form is therefore to be tested by reference to provincial law. The scope of provincial law in regard to matters of capacity is more debatable and we will examine it later.

The following case is the leading case in this area.

Berthiaume v. Dastous
[1930] A.C. 79, (P.C.)
(Lords Dunedin, Darling and Warrington,
Duff J and Sir Lancelot Sanderson.)

Appeal (No. 127 of 1928) from a judgment of the Court of King's Bench for Quebec (October 30, 1928) affirming a judgment of the Superior Court, District of Montreal (May 30, 1928).

The respondent brought an action against the appellant in the Superior Court claiming that a marriage between herself and the appellant solemnized in Paris be declared valid, that she should be granted an order for separation on the ground of the appellant's misconduct, that the community of property be dissolved, and that alimony should be granted to her; alternatively she prayed that the marriage should be held to have been contracted by her in good faith, and that it produced civil effects, as provided by arts. 163, 164 of the Civil Code of Quebec.

The facts, and the material provisions of the Civil Code of Quebec, appear from the judgment of the Judicial Committee.

The trial judge (Loranger J.) held that although the marriage was void according to the law of France he had discretion under art. 156 of the Civil Code to declare it valid, and that in the circumstances of the case he should exercise that discretionary power. He therefore granted the relief prayed, including the

> was declared, it was equivalent to saying that no communauté de biens ever really existed; to declare the dissolution of what never existed would be a pleonastic proceeding. But the learned judges of the court below who decided that the marriage was valid have had no opportunity of saying what are exactly the civil rights of a putative marriage, and since the case was first heard their Lordships have had their attention directed to several other cases, which seemed to point to a settled practice as to this, which their Lordships in such a matter would not willingly disturb. They are, therefore, of opinion that the case should be remitted to the Superior Court of Quebec to deal with the civil effects of a marriage held null but allowed to be putative, it being distinctly understood that their Lordships are clearly of the opinion that the continuance of alimony to the wife is one of the civil effects, the amount of which it will be for the Court of Quebec to determine, the amount decreed for in the judgments recalled being continued in the meantime.
>
> The costs of the appeal will be borne as between solicitor and client by the appellant, who will also fulfil the other articles of the conditions on which special leave to appeal was granted.
>
> Their Lordships will humbly advise His Majesty that the appeal should be allowed and the case remitted to the Superior Court accordingly.

NOTES

1. *Berthiaume v. Dastous* suggests that the choice of law rule governing the formal validity of the marriage is that the marriage must satisfy the formal requirements of the place where it is performed. This rule is, apparently, mandatory. It is not only sufficient that the marriage comply with the rules of *lex loci celebrationis* (hereinafter abbreviated as *l.l.c.*): it is necessary. This rule has been hallowed by successive editions of *Dicey & Morris*, *Cheshire* and *Castel*. The last named author says: "The settled general rule is that the formalities of a marriage are governed by the law of the place of celebration. This is an application of the maxim *locus regit actum*." (*Castel*, 2nd ed. p. 285).

2. The rule in *Berthiaume v. Dastous* has always been accepted without question. The following points might be noted:

(a) This case arose on appeal from the courts of Quebec, and might have been regarded as of little relevance in the common law.

(b) The conclusion that the marriage was valid or void had possibly some, but more probably little, bearing on the issue whether the woman could obtain maintenance from the man. It also appears likely that the validity of the marriage would have had no effect on the legitimacy and the right of any children to succeed to their father's estate. To regard the marriage as invalid is, therefore, not

necessarily a drastic step. (It must, of course, be recognized that the emotional and psychological impact of the decision on the woman might have been severe. To a large extent the law has to take a much cruder approach. The law cannot make people love and respect each other. It can do little more than protect rights to support and succession. In law, issues of marriage nearly always translate sooner or later into issues of money.) To apply this case to the common law (and to ignore, for example, the strong policy represented by the *Marriage Act*, s. 31) is to invite disaster. In the common law context this effect of the decision can have very serious consequences for the parties.

(c) The civil law systems generally provide that compliance with the *l.l.c.* is sufficient but not necessary. Why does Lord Dunedin refer to the rule as a rule of "international law"? (Perhaps the civil law countries create for themselves the problems that arise from the mixing of incompatible regimes, but that is their problem.)

(d) It is, as a matter of fact, extraordinarily hard to find cases other than *Berthiaume v. Dastous* itself where the effect of the rule is to make a marriage *invalid*. The bulk of the discussion in the textbooks is either on some odd problems like the following cases or on exceptions to the rule that, had the rule been otherwise, need never have caused difficulty.

3. Special problems have arisen with proxy marriages. A proxy marriage is a marriage in which one of the parties is not present, but authorizes someone else to act as agent for the purpose of consenting to the marriage. Such marriages are unknown to the common law, but are perfectly valid in the civil law. They are valid under the rule of *Berthiaume v. Dastous* if the marriage ceremony takes place in a jurisdiction where such marriages are effective: *Apt v. Apt*, [1948] P. 83; [1947] 2 All E.R. 677, *Frustaglio v. Barbuto*, [1960] 0.W.N. 551. An argument has been made that they can be supported under the *Marriage Act*, s. 31: Canter, (1957) 35 *Can. Bar Rev.* 1195.

4. The strength of the common law presumption in favour of marriage is strongly supported by the presence of a provision like s. 31 of the Ontario Marriage Act. The provisions of the B.C. legislation do not offer quite so strong an argument, but neither do they undercut validity of the presumption nor suggest that it is irrelevant.

5. The issue raised by *Berthiaume v. Dastous* and the conflicts issues

of marriage is the correct way to approach the problem. In other words, how do we begin to think about the issue of whether a couple are validly married or not? This issue will dominate much of the remainder of these materials and cuts right to the heart of the purpose of our rules and how we should think about them. The basic common law position is that there is a strong presumption in favour of the validity of a marriage, s. 31 of the *Marriage Act* is not so much an example of the presumption as it is of the same concern expressed in the substantive law.

6. When we talk about there being a presumption, we have to ask, "What triggers the presumption?" There are two facts that raise the presumption. One is evidence of a marriage ceremony, the other is long co-habitation of the parties who are alleged to be married. When we consider these facts in a wholly Canadian context we have a fairly good idea of what facts are likely to present evidence of a marriage ceremony and of the significance of co-habitation. Very little changes in the majority of cases in the conflicts context. Almost all of the cases we or any Canadian court are likely to consider will be cases arising in the Western tradition, that is, in the Judeo-Christian concept of marriage and family. We do not, therefore, have to worry much about more exotic forms of social arrangements. If polygamy or polyandry, for example, were common, we would find it very hard to express our values in an idea that we would presume any marriage to be valid. Since conflicts cases can raise problems of polygamy, we may find that we have to be careful how we generalize our principles over the full range of problems that we might encounter.

7. For the majority of cases that we will consider we can start our process of reasoning by saying that if there is evidence of a ceremony of marriage, the onus is on the person who argues that it is invalid to show that that conclusion must be drawn. Similarly, if the parties whose marriage is in issue are dead but lived together as husband and wife, we can assume a marriage ceremony and force the person who would deny that there was a marriage to prove it. An analogous proposition can be developed in regard to contracts. A contract with the affidavit of a subscribing witness. Somewhere in the middle there is the kind of arrangement that causes the problem of the "Battle of the Forms". We cannot call the arrangement a contract without automatically precluding the question we have to consider, viz. what are the terms of the arrangement that the parties made? It is sufficient that we have a general idea of what will operate to raise the presumption. This idea takes its form from our understandings of how people typically act and of what kinds of expectations and reliance are likely to follow from certain acts of one party. Thus we justify starting from the presumption of validity in contracts because such a position is more likely to protect the parties' reasonable reliance on the mutual understandings which they believe constitute the arrangement.

8. Similarly in marriage. We do not justify the presumption in favour of marriage because of some moral belief that people who live together should be married but because the fact of co-habitation or of a ceremony typically will cause one party (usually the wife) to rely on the other in certain clearly understood ways. So far as the law is concerned, the repeal of criminal sanctions against fornication means that we are only really concerned about the existence of a marriage and reliance thereon in so far as it provides a basis for financial support. What triggers the presumption is, therefore, the likelihood that what the parties did create in one party reasonable reliance on the other for financial support or the reasonable expectation of such support.

9. Unfortunately the law of marriage is, whether we like it or not, closely bound up with moral views and expresses a position on important moral questions. The effect of this fact is that our efforts to recognize the force of the arguments based on reliance are seriously compromised. The need to compromise arises because we have rules regarding bigamy. A marriage will be invalid because one of the parties was married at the time he or she went through the subsequent (second) ceremony of marriage. We cannot, therefore, give effect to our concern for anyone's reliance on a second marriage because evidence of the previous marriage forces us to hold the second marriage invalid.

10. The problem of deciding when or how to start reasoning about the issue of the validity of a marriage is not changed by the recognition of the effect of our rules regarding bigamy. We still can justify the presumption in favour of marriage because that is most likely to lead to sensible and satisfactory decisions even though we knew that we may be forced to adopt a solution in the individual case which we know will defeat one party's reliance or reasonable expectations.

11. As you read the next case consider how you think the process of thinking about the marriages should begin and when it should end. Consider some of the obvious factual variations and whether your analysis allows for different results and whether these are more or less satisfactory than others that are possible. What effect does the fact that this is a conflicts case, that is, a case with geographically complex facts, have on any aspect of your or the court's analysis? Does the conflicts aspect of the case provide flexibility that would be denied were it a case wholly in England, Austria or Canada? Do you think that the court had adequate information about the law of Austria? If not, what further information would you like?

12. Are you helped by the following statement concerning the rules of bigamy?

Globe and Mail, May 4th 1983, p. 6.

SOFT ON BIGAMY

Although death was considered a fitting penalty for bigamists before 1603, it would be regarded by most Canadians as a mite severe for 1983. Ontario County Court Judge Stephen Borins, who has been doing some reading on the history of the offence, is certainly on safe ground in concluding that society's attitudes to marriage have undergone dramatic change in recent times, yet he seems to be running ahead of most of us in assessing the extent of the change.

When he handed Stanley Walter Friar a suspended sentence and ordered him to perform 250 hours of community service for marrying three women without obtaining a divorce, Judge Borins may well have been talking into account some of the curious circumstances of the case, including the fact that Mr. Friar had not deceived any of the women about his previous relationships. One of them had actually insisted on "marriage".

There is some difficulty, however, in following the judge's reasoning that because people nowadays live together unmarried without scandalizing community or friends, the institution of marriage—the contract of marriage—need no longer be taken very seriously. It might just as easily be argued that the ease with which such associations may now be formed outside marriage leaves the behaviour of the bigamist less, not more, acceptable than before.

In any event, changes in social tolerance of human relationships formed outside marriage should not be confused with changes toward the institution itself. Marriage remains an undertaking to be entered into solemnly and, while this is not always evidently the case, the courts should not hasten it toward some more trivial status.

13. Note the following extract from "Bigamy", Law Reform Commission of Canada Working Paper #42, 1985, pp. 11, 30-32.

The prohibition of bigamy, like polygamy, and *a fortiori* making them criminal, is . . . not simply a matter of choice. Certainly, one may agree with Lord Devlin that the institution of monogamous marriage is an expression of social morals, but making threats to the monogamous principle criminal is perhaps based more on the defence of a social institution than on a defence of public morality. From this point of view, the most serious and menacing threats are those which compromise the institution of marriage itself. This sociological aspect can be used to identify clearly a degree of seriousness going beyond simple threats to the fundamental characteristics of marriage.

This is why the prohibition of bigamy seems justified, since by assuming all the ritual and official characteristics of marriage, such conduct destroys the meaning of the institution itself. Aside from its duplicity, a bigamous marriage is a valid marriage in all respects: this is what makes it a real threat to the institution. In consultations, certain contributors suggested adopting a form of bigamy in which

fraud would be the deciding factor. Although attractive, we do not regard this solution as acceptable, for the concept of fraud does not encompass all situations in which there may be a threat to marriage. We feel that the proposal adopted by the Commission already takes into account the situations in which there is a victim.

This is not true of other threats to marriage, which may be in conflict with the institution but are not a denial of it. Thus, adultery, concubinage and clandestine or irregular marriage do not undermine the institution of marriage as part of the social framework. On the contrary, such conduct is defined by reference to the institutional norm. Matrimonial law is able, without the help of criminal law, to encompass and control it.

The same is true of polygamy, which is a practice so foreign to our way of life that it does not directly threaten the institution of marriage. Devoid of any official character, polygamy may be regarded as a marginal practice in the same way as adultery and so, does not call for criminal penalties. This is the view, replete with moderation, expressed by Glanville Williams:

> It is thought that the law should discountenance them, this may be done sufficiently by failure to provide for them in the civil law, rather than by attempting the sterner dissuasion of penal sanctions. [G. Williams, *Criminal Law*, 2nd ed. (London: Stevens, 1961), p. 750.]

The existing criminal offenses of feigned marriage and marriage contrary to law undoubtedly correspond to departures from the formal requirements of marriage. However, they no longer have the moral and social seriousness which historically justified making them subject to criminal prohibitions. Clandestine marriage and irregular marriage today have no legal status which can compromise the institution of marriage. Modern matrimonial law provides a means for considering and dealing with the problems raised.

III. Proposed Legal Measures

The following proposals have adopted a new formulation in order to make the provisions more precise. However, we have also given, as an alternative, a more literal formulation based on the present provisions to facilitate comprehension of the proposed amendments.

RECOMMENDATION 1

We recommend that section 254 [now s. 291] of the present *Criminal Code* be repealed and the following new provision substituted:

> 254. (1) A person who goes through a form of marriage in Canada where one of the spouses is already bound by a former marriage that has not been dissolved commits bigamy.
>
> (2) A Canadian citizen or a permanent resident of Canada who goes through a form of marriage outside Canada when he is already

bound by a former marriage that has not been dissolved also commits bigamy.

(3) A person who commits bigamy is guilty of an indictable offence and is liable to imprisonment for five years.

An alternative formulation of the new section 254 could also read as follows:

254. (1) Every one commits bigamy who

(a) in Canada

(i) being married, goes through a form of marriage with another person, or

(ii) knowing that another person is married, goes through a form of marriage with that person;

(b) being a Canadian citizen or a permanent resident of Canada does outside Canada anything mentioned in subparagraph (a)(i) of this subsection.

(2) Every one who commits bigamy is guilty of an indictable offence and is liable to imprisonment for five years.

Bigamy is still an indictable offence. The reasons for its being a crime justify this characterization as well as the *Criminal Code* prohibition. However, the sentence proposed by the *Code* should be reassessed by the Commission in the more general context of sentencing policies.[1]

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[1]See comments by Judge Borins in *R. v. Friar*. April 27, 1983. Ont. Co. Ct. (W.C.B. No. 10-0040, p.22):

> However, where both parties know the facts and marry perhaps to make the cohabitation appear respectable, the offence, in my view, becomes a relatively minor one and not deserving of severe punishment.
>
> It may be that when the Criminal Code is reviewed, as I understand it will be by Parliament over the next period of time, that cognizance may be taken of the following comment in *Smith and Hogan* at 688-9:
>
> > Bigamy may still fulfil a useful purpose as a crime in the type of case *with grave social consequences*; but it cannot be regarded as satisfactory that a grave felony should extend so far beyond this to cases no longer regarded as really serious offenses.

Subsection (2), (3) and (5) of the present section 254 are completely repealed.

Subsection (4) of the present section 254 is incorporated into the new definition of "former marriage" (or "married"), which might be set out in section 196 or in a new subsection of section 254.

RECOMMENDATION 2

We recommend that the expression "former marriage" (or "marriage" if we adopt the alternative formulation of section 254) be defined as follows:

> (1) For purposes of section 254, "former marriage" means a marriage that may be recognized as valid in Canada.
>
> (2) A marriage shall, for purposes of section 254, be deemed to be valid unless the accused establishes that it was invalid.

RECOMMENDATION 3

We recommend that the expression "form of marriage" in the present section 196 be amended as follows:

> "Form of marriage" means a public ceremony of marriage that is recognized as valid by the law of the place where it was celebrated.

Paragraph 196(b) is repealed. The new definition could more appropriately be incorporated into a new subsection of section 254.

RECOMMENDATION 4

Furthermore, we recommend that:

. . .

(3) sections 256 (procuring feigned marriage), 257 (polygamy), 258 (pretending to solemnize marriage) and 259 (solemnizing marriage contrary to law) of the *Criminal Code* be repealed.

Starkowski v. Attorney-General
[1954] A.C. 155, [1953] 2 All E.R. 1272 (H.L.)
(Lords Morton, Reid, Tucker, Asquith and Cohen)

APPEAL from the Court of Appeal (Somervell, Denning and Romer L.JJ.)

This was an appeal from an order of the Court of Appeal dated July 30, 1952, dismissing an appeal from an order of the Probate, Divorce and Admiralty Division (Divorce) of the High Court of Justice dated February 18, 1952, whereby it was pronounced that the marriage of Henryka Antonia Starkowska (born Juszczkiewicz) and Mieczyslaw Starkowski (parents of the appellant

[LORDS MORTON, ASQUITH and COHEN agreed.]

NOTES AND QUESTIONS

1. The traditional analysis of this case puts it into a special category usually called "The Time Factor" or "Time Element". (See, *e.g.*, *Dicey & Morris* (11th ed.), Chapter 4, Castel, *Canadian Conflict of Laws* (2nd ed.), Chapter 9.) This problem is supposed to deal with the issue raised in *Starkowski* by the fact that the date of reference to the *l.l.c.* under *Berthiaume v. Dastous* has to be determined.

2. The fact that there can be a special "temporal" problem in Conflicts is another illustration—as if more were needed—of the importance of the theoretical structure that underlies or supports the whole notion of conflicts.

3. How can we present the issue raised by *Starkowski* so that the issue is correctly presented as a *marriage* issue rather than a *conflicts* issue?

4. What would happen under the traditional analysis if Henryka had married for the second time *before* the registration of the first marriage in Austria?

5. The following Canadian case raises the *identical* question as faced the House of Lords in *Starkowski*. This fact is true even though the issue was presented as one dealing with the capacity of the woman to marry and not with the formalities of the marriage. It is important that you see the case simply as one where there was an impediment to a valid marriage which was subsequently removed.

Ambrose v. Ambrose
(1960), 25 D.L.R. (2d) 1 (B.C.C.A.)
(O'Halloran, Smith and Sheppard JJ.A.)

SHEPPARD J.A.: — The appeal is by the respondent in the proceedings below from the judgment of McInnes J. [21 D.L.R. (2d) 722] holding her alleged marriage to the petitioner to be a nullity. The learned trial Judge held [p.733]:

> In the result, there will be a decree of nullity as prayed for on the grounds that at the time of the alleged marriage between the petitioner and the respondent on September 14, 1935, there was a valid and subsisting marriage between the respondent and one Harold D. Harnish who at the relevant time was, and still is, alive.

The sole question is whether subsequent legislation of the State of California which came into force in 1955 or 1956, and the order of June 17, 1958,

California had full jurisdiction to make the retroactive order of June 17, 1958.

A practice had grown up in the early days of British Columbia for a decree *nisi* in divorce matters to be followed after the end of a prescribed period, by a final order. . . .

But for more than 30 years past in this Province that practice of decree *nisi* has gone out of fashion, and only one order, that is a final order, has been granted pursuant to s. 16 of the *Divorce and Matrimonial Causes Act*, 1857, c. 85, which became the law of British Columbia in 1858. There was no appeal to a Court of Appeal in British Columbia in divorce and nullity matters until 1937, and see *Poskitt v. Poskitt & Bishop*, [1949] 3 D.L.R. 798, particularly at pp. 809-10.

The English and British Columbia law in this aspect has been mentioned to show that by no logical reasoning can it be urged that the order of the Superior Court of the State of California of June 17, 1958, is in any respect offensive to English and British Columbia "notions" in the sense Lord Lindley used the term in *Pemberton v. Hughes, supra*. It should be added that there is a retroactive validation provision in s. 43 of the British Columbia *Divorce and Matrimonial Causes Act*. The provision therein is that in cases before the 31st January, 1912, where parties had been divorced by a final decree, and have been married after such final order before the expiration of the time limit for appeal, then the marriage is declared to be valid, and the parties with respect to whom the ceremony or rites were solemnized shall be deemed to have been lawfully married on the date of the ceremony or rites.

For the foregoing reasons I would set aside the judgment under appeal, dismiss the petition for nullity and allow the appeal accordingly.

QUESTIONS

1. In seeing whether the B.C. Court of Appeal correctly applied *Starkowski* consider the following questions:

(a) Would the result have been the same had the wife's incapacity been due not to her prior marriage but to the fact that the parties, (she and Ambrose) were first-cousins, and by Californian law in 1935 first-cousins could not marry? Assume then that this rule was subsequently amended in the way that her incapacity was removed.

(b) What did all the parties in each case expect?

(c) Were all these expectations reasonable? (When considering the parties' expectations consider the time at which you would be interested in their expectations.)

(d) What kind of process of thinking about marriage can lead to the statement by Sheppard J.A., that the "husband" could not be "divested" of his right to treat the marriage as a nullity?

There were subsequent proceedings: (1962), 39 W.W.R. 241 (B.C.C.A.) in which the right of the woman to maintenance was discussed. Sheppard J.A., referred to the woman as "wilfully enter[ing] to a bigamous marriage", but, with the rest of the court (Bird and Davey JJ.A.) concluded that she was not thereby disentitled to any relief.

2. It is important to keep in mind the fact that for many people the validity or existence of a marriage is not something to be treated lightly. A person who thought that he or she was validly married could be devastated by a judicial decree declaring that no marriage had taken place and this consequence might occur even though some measure of support was forthcoming.

A further example of the same problem, this time in a wholly Canadian setting, is the following case:

Re Howe Louis
(1970), 14 D.L.R. (3d) 49 (B.C.C.A.)
(Tysoe, Branca and Nemetz JJ.A.)

TYSOE J.A.:— This is an appeal from the order of Wilson C.J.S.C., whereby he granted the application of the respondent, referred to hereafter as "the petitioner", made under the *Testator's Family Maintenance Act*, R.S.B.C. 1960, c.378, for a portion of the estate of the deceased testator Howe Louis.

The testator was a Chinese gentleman and the petitioner a Chinese girl. In April, 1921, the petitioner was a girl of 16 named See Fung and the testator Howe Louis was 20 at that time. The petitioner and the testator were married according to Chinese custom, the procedure being this: First, the marriage of the petitioner and the testator was arranged by their parents. Next, the parents of the petitioner held, at Agassiz, British Columbia, where the petitioner lived with them, a pre-nuptial ceremony at which her family, relatives and friends were gathered and at which it was announced that the petitioner was to be married to Howe Louis. Following this the petitioner was taken by her father to Regina, Saskatchewan, where the testator lived, and was met there by the matchmaker who had arranged the marriage. On April 3, 1921, at Regina, there was a large supper attended by the petitioner and her father, the testator and his father, and the matchmaker. On this occasion documents were signed by the testator and his father stating that the petitioner was accepted as the wife of the testator. The said documents were retained by the testator. Thereafter the petitioner lived with the testator as his wife in Regina at his father's home. The testator's brother Jim Louis also lived there. Both Jim Louis and the

> effected, it is good all the world over, no matter whether the proceeding or ceremony which constituted marriage according to the law of the place would or would not constitute marriage in the country of the domicil of one or other of the spouses.

I now quote from Dicey and Morris at pp. 234-5:

> So well established is the principle that compliance with the local form is sufficient, that it applies even though the marriage, originally invalid by the local law, has been subsequently validated by retrospective legislation in the *locus contractus*. This principle applies to...foreign legislation validating marriages celebrated in the foreign country, even though at the time when the legislation takes effect both parties have acquired a domicile in England.

This statement is fully supported by *Starkowski v. Attorney-General*, [1954] A.C. 155.

It follows from what I have said that the marriage in Saskatchewan in April, 1921, between the petitioner and the testator was a legal marriage by the laws of that Province, that that marriage is recognized in British Columbia as a valid marriage and the petitioner is the testator's wife within the meaning of the *Testator's Family Maintenance Act* of British Columbia and is entitled to the benefits of that Act. . . .

The other judges agreed in the result.

QUESTIONS

1. Do the provisions of the Saskatchewan Act give any clue to how that legislature might have resolved the problems posed by the variation in the *Starkowski* facts that was mentioned after that case?

2. Do you find the legislative solution sensible?

We now need to stop and review the cases that we have just considered. We need to examine the methods that are available to solve the problems that the cases raise and to consider where we go from here. It is first necessary to remind ourselves of what we are seeking to do. One way to express the purpose of any proposed analysis is to say that we are seeking to develop predictively useful rules. Such a rule must take account of the fact that courts generally speaking want to reach sensible and just results: results that allow the judge to sleep at night. This means that the rule must be faithful to or be a reflection of the values that are relevant in the cases. We could easily imagine a society organized in such a way that marriage as we know it would not exist or have a very different role to play than it has with us. We are, however, forced to accept the fact that marriage is important in at least two respects. It is a reflection of powerful and pervasive moral ideas and it is a fundamental human relation. Predictively useful rules must then reflect values associated with these facts.

The starting point for our reasoning is faithful to this aim. If we start from the presumption in favour of a marriage we acknowledge the importance of marriage and we are most likely to achieve the results that are socially desirable. We know as well that the values that determine our starting point are not absolute; there are other values that we may have to accommodate. Thus it is that with the best will in the world, we cannot conclude that *both* of Henryka's marriages in *Starkowski* are valid; we are forced to choose one. If we were developing our rules and had no background to consider, we might sensibly conclude that her second marriage, as a subsisting marriage, should be preferred over the first. This view, of course, runs head on into our rules regarding bigamy. We have no obligation to give those rules more effect than necessary but we have to acknowledge that they exist. It is worth noting the precise nature and origin of our problem. If all we were concerned with was the right of either child to succeed to the estate of either of his parents, modern Ontario law makes the validity of either marriage irrelevant. (*Children's Law Reform Act*, R.S.O. 1990 c. C.12, s. (1)). Similarly, if all we were concerned with was the right of any spouse to receive maintenance from the other, the validity of any marriage would be irrelevant. (FLA, Part III.) Such freedom is very valuable and has done much to transform the modern law of marriage into something more humane and sensible.

Unfortunately, however, we can be occasionally forced to ask the abstract, status question, "Is Henryka validly married to Richard or Michael?" At the very least, that enquiry might be important to Henryka. The analysis that is forced upon us when this happens is analogous to a property one. We are concerned about "title" questions. Who owns Blackacre? Who "owns" Henryka, or, conversely, whom does she "own"? The rules regarding bigamy provide in the context of *Starkowski* that Richard, not Michael, "owns" Henryka, or *vice versa*. It is, of course, beside the point that Richard may be as dismayed by the conclusion as anyone; he would quit-claim if he could, just as Henryka would "quit claim" him.

If we ask why we prefer Richard's claim to Michael's, or Henryka's first marriage to her second, we run into a serious problem, for the answer we must give is likely to be unsatisfactory to most people. The answer is that a bigamous marriage is void. But this is not an answer. Why is a bigamous marriage void? The answer to this question is not easy if we believe that

legal rules should forward identifiable social purposes. There may be a moral answer, but the real reason is theological and historical. If we wanted to be facetious we could say that the reason is to keep the civil servants' records simple! The truth is that the rule is irrational unless one accepts certain beliefs that are based on the canon law of the early Christian church. The consequence of the rule's being so justified is that it is very hard to determine its scope. Do we use the rule to invalidate as many or as few marriages as we can? In *Starkowski*, for example, the rule was applied to invalidate Henryka's second marriage. There is nothing impossible about using the rule to invalidate Henryka's second marriage even if it had *preceded* the retroactive validation under Austrian law. Why do we feel that to do this would be worse than doing what the court did? The answer to this must be because like every other value, the value, whatever its origin, behind the rules regarding bigamy is not absolute. We are prepared to support Henryka's second marriage when it precedes the retroactive validation of her first because we want to recognize the subsisting marriage. We feel able to do this because we can regard her first as invalid at the date of her second because, on these facts, her first has not yet been validated. (We have to ignore the problems associated with the conclusion that her first was invalid. The source of these problems is the requirement that the Kitzbühel ceremony comply with certain requirements. Why should there be any such requirements? Should we seek to give these requirements a wide or narrow scope? Some of these issues will be dealt with in connection with the next case.)

It may be objected that this analysis ignores the possible existence of reasonable expectations of support on the part of the first spouse. These expectations can be admitted, but that admission does not solve our problem. We have either to pursue the property analogy: marriage creates a right in each spouse to "own", or claim "title" to the other, or a more flexible contract argument. The former does not resolve the problems of competing claimants if there is either no basis for the first spouse's expectations (the "marriage" lasted for a very short time and any expectations of support are, *on the facts of that marriage*, unreasonable) or a very strong basis for the second spouse's claim (reliance as a fact for a long time and to a high degree). The "contracts" argument necessarily permits the possibility that both spouses may have relied on the common spouse for support. (There are now, as it were, two creditors, equally entitled to share in the assets of the debtor.) The invocation of the rule regarding bigamy will only be a functional solution in a proportion of the cases and must operate haphazardly. It will be as likely to defeat reasonable expectations as it will be to protect them.

We have now reached the point where we can propose the following approach. We start from the presumption that a marriage is valid. Among the allegations that will meet and overcome the presumption is the fact that one of the parties to the marriage is already married. We see no reason, however, to give this allegation more effect than we are compelled to, and so if we can find any way to limit the effect of our rules regarding bigamy we will do so. Since our rules regarding bigamy make a subsequent marriage void, the effect of the suggested approach will be to regard a subsequent marriage as more worth saving than the earlier marriage. We can express the same thing by saying that the second marriage attracts or raises the presumption while the first does not. In other words, we will not strain to hold a first marriage valid when there is a second one. We could go one step further. We will recognize the last marriage as

valid if we can, by regarding that marriage alone as raising the presumption. Any earlier marriages do not raise the presumption. We give adequate effect to our bigamy rules by admitting that if an earlier marriage is unquestionably valid, a subsequent marriage will be void. (It goes without saying that it is assumed that there is no dissolution of the earlier marriage by divorce or death.)

This approach gives us a basis for dealing with the exact facts of *Starkowski* and the variation on them in a way that, it is submitted, is both principled and sensible. We get some support for this approach from the Saskatchewan legislation in *Re Howe Louis* which, at least, enables the parties to rely on a judicial determination of the validity of an earlier marriage without the risk of subsequent validation. The approach suggests that what is wrong with *Ambrose* is that the B.C. Court of Appeal ignored the fact that by the time they came to consider the question the reason for being concerned about the validity of the marriage that might at one time have existed has disappeared.

We can test the approach by considering whether any other result in *Ambrose* than holding the marriage valid would be more desirable. The actual decision defeated the wife's reliance and reasonable expectations, and cannot be regarded as protecting any reasonable expectation of the husband. To hold the marriage void vindicates the rules regarding bigamy but in a way that suggests that we are indifferent to whether we hold a marriage to be valid or invalid. It has been argued here that we are never indifferent to this issue. We always hold a marriage to be valid if we can, and unless something has occurred, for example, a second marriage, to attract the presumption or policy in favour of validity to itself. An argument that by holding the marriage to be invalid we are forwarding the purpose of the law of California can be met by the fact that California has formally and explicitly denied that it now has any such purpose for its law. An argument that the decision reflects an original B.C. concern for the sanctity of marriage, viz. the marriage of Harnish and the wife, is possible but hard to defend in the light of the fact that the marriage was to all intents and purposes dead. (See, e.g., *Fender v. Mildmay*, [1938] A.C. 1) and the strong policy of B.C. (as has been postulated) in favour of marriage and of restricting the effect of the rules regarding bigamy. It would, of course, be possible for the B.C. Courts to have regarded the marriage as valid even though the California divorce had not been made retroactive and even though it had never been made final. (O'Halloran J.A., in a part of his judgment that it is not reproduced, referred to *Fender v. Mildmay* and to a B.C. case that considered it, *Pope v. Pope*, [1940] 3 D.L.R. 454. O'Halloran J.A., concluded by saying:

> The decision of the majority of the House leaves little doubt that the conclusion in *Fender's* case rested solely upon the view that the decree *nisi* was in truth the dissolution of the marriage by adjudication of the Court even though its final operation might be suspended for a few months until the decree absolute was obtained more or less as a matter of course.

Such a decision would be consistent with the approach argued for here and would only cut down the concession to bigamy. Such a contraction of the concession could be defended and there may well be cases where it would be desirable. We do not have to go so far to provide an argument in favour of a contrary result in *Ambrose*.

The next case and some possible variations upon it offer a test of the approach that has just been outlined and evidence of a need to generalize it. A recurrent theme of these materials will be to consider how far such generalizations can go.

As you read the next case consider carefully whether the traditional rules offer any basis for a principled decision both in the case itself and in the possible variations upon it.

Taczanowska v. Taczanowski
[1957] P. 301; [1956] 3 All E.R. 457
(Court of Appeal, Hodson, Parker & Ormerod L.JJ.)

The following facts are taken from the judgment of Hodson L.J. in the Court of Appeal. The parties, Krystyna Roth, spinster, and Stanislaw Taczanowski, went through a form of marriage in the Parish Church of the Resurrectionists in Rome on July 16, 1946. They were Polish nationals, the bride being a civilian refugee who had been staying in a convent in Rome, and the bridegroom an officer in the Polish 2nd Corps, then serving in Italy, in the course of his military duties. The ceremony was performed by a Roman Catholic priest then serving as a Polish army chaplain. There was no question but that the parties intended to enter into marriage. They lived together until 1950, having from the early part of 1947 lived in England, where it was pleaded that they were domiciled at the time of the institution of the present proceedings by the wife on June 15, 1955, for a decree of nullity of marriage. In November, 1947, a child was born.

The wife's petition came before Karminski J. who said:

> . . . I am therefore left in this position. There can be no doubt that the parties to this suit went through a ceremony of marriage in Rome not only with the desire of entering into a valid marriage, but in the belief that the ceremony was effective. The presumption in favour of a valid marriage is, as I have pointed out earlier in my judgment, a very strong one. But the presumption, though strong, may be rebutted, and must indeed fail before compelling evidence the other way. For the reasons set out in this judgment I have come to the conclusion, though with very considerable reluctance, that the ceremony of marriage celebrated between the petitioner and the respondent on July 16, 1946, must be declared to be null and void; and I pronounce a decree nisi of nullity accordingly.

Karminski J. accordingly made a decree nisi of nullity.

The husband appealed.

HODSON L.J. stated the facts and continued: The petitioner alleged that the ceremony was null and void because in form it did not comply with the lex loci, namely, Italian law. She relied upon the rule established by the decision of Sir Edward Simpson, sitting in the Consistory Court of London, in *Scrimshire v.*

> was a mere consensual contract, only differing from other contracts of this class in being indissoluble even by the consent of the contracting parties. It was always deemed to be a contract executed without any part performance, so that the maxim was undisputed, and it was peremptory, "*Consensus, non concubitus, facit nuptias vel matrimonium.*"

The ceremony of marriage here fulfils all the essentials of a common law marriage, and in my opinion should be recognized as such notwithstanding the foreign nationality and domicile of the parties at the date of the ceremony.

. . .

In conclusion, I would only add that the court was referred to a number of cases of which *Maclean v. Cristall* is an example, and *Wolfenden v. Wolfenden*, which was expressly approved by the Privy Council in *Penhas v. Tan Soo Eng*, is another example, which are apparent but not real exceptions to the lex loci rule, since they are cases in which British subjects were held to have taken with them to a British colony so much of the common law as was applicable to their present situation, so that, in truth, the law applied was the law as found by the court in the particular cases to be the lex loci itself.

These cases cannot, in my opinion, be directly relevant to the problem under consideration, since there is here no question of the subjects of a paramount power taking with them their own laws into colonies where those subjects have settled. I would allow the appeal.

PARKER and ORMEROD L.JJ. wrote judgments to the same effect.

NOTES AND QUESTIONS

1. The marriage in *Taczanowska* is said to be a valid common law marriage. The term "common law marriage" as it is now used is a perversion of the true meaning of the phrase. At common law a marriage was valid if the parties exchanged promises of marriage, that is, a declaration of present intention, *verba de praesenti*, as opposed to the promise to marry that was the engagement. Originally no priest was required in either the canon law or common law. In the canon law, a priest was required after 1563, but this requirement did not apply in England since the split from Rome had already occurred. In the common law, however, there was no requirement that a priest be present or that any particular form be observed. In this sense, the marriage of Krystyna and Stanislaw would have been valid at common law. The result of the case, the upholding of the marriage is, of course, in accordance with the general policy in favour of marriage. The stated basis for the decision is that these parties cannot be held to have submitted to Italian law. We have to consider how likely it is that this ground for the decision can operate as a principled basis for this and other cases.

2. Before we explore this issue, note the use of the doctrine of *renvoi*. The English choice of law rule to determine if a marriage is formally valid is, as

you know, that such issues are governed by the law of the place of celebration. When the English court investigated Italian law it discovered that Italian law would refer the issue to Polish law as the law of the parties' nationality. The Court then examined Polish law and discovered that the new, communist government had changed the old Polish law so that the marriage would now be invalid. No weight was given to the fact that the Polish troops that had served with the Allies in Western Europe were, in effect, repudiated by the new Polish government. It is possible to argue that the reference by Italian law to Polish law is an indication that Italian law had not concern to apply its provisions to these parties. We could then phrase the result of the analysis by saying that no purpose of Italian law would be served by its application to *those parties*.

3. There is, however, a problem with this argument. It is not possible to maintain that our choice of law rules represent any coherent policy or purpose of the law. The whole foundation of the criticism of traditional conflicts doctrine has been the argument that the jurisdictional selecting rules of the traditional choice of law process are purposeless and, therefore, irrational and largely unusable. We have, therefore, no justification for regarding Italian choice of law rules as expressing any coherent Italian policy. In other words, two illogical and purposeless rules do not make a logical rule.

See: Weintraub, "The Impact of a Functional Analysis Upon the 'Pervasive Problem' of the Conflict of Laws" (1969), 15 *U.C.L.A. L. Rev.* 817 and Seidelson, "Interest Analysis: For Those Who Like It and Those Who Don't" (1973), 11 *Duquesne L. Rev.* 283.

4. *Taczanowska* was followed in *Lazarewicz*, [1962] P. 172, [1962] 2 All E.R. 5 (P.D.). The facts were that a Polish serviceman, stationed in Italy with the Polish armed forces, married an Italian woman. The marriage took place in a Polish civilian refugee camp where the wife's father was living. The husband came from the military camp where he was living to the civilian camp where the wife was living. The marriage was performed by the Polish chaplain of the civilian refugee camp, on February 2, 1946. The priest failed to comply with the requirements of Italian law in that he did not read over to the parties certain provisions of the Italian Code and the marriage was not registered in accordance with Italian law. The parties came to England later in 1946 and a child was born in 1949. The parties separated in 1956. The wife petitioned for nullity. The judge, Phillimore J., reviewed the judgment of the Court of Appeal in *Taczanowska* and concluded his judgment by saying:

> In the course of their arguments in the present case counsel did not hesitate to criticise this decision. I do not propose to recite their arguments; the decision is binding upon me and I must follow it. The vital distinction in the present case is that not only is there no evidence to suggest that the parties did not choose to submit to Italian civil law, but all the evidence indicates that they did.

> I have no doubt that these two people intended to contract a marriage in accordance with Italian law, and, indeed, as an Italian national, the bride could not do otherwise. They deliberately submitted themselves to Italian law, and there is, therefore, no room for the importation of any other law. These two people must at the time of the ceremony have visualised the possibility of living together in Italy, the country where they were both situated at the time and which was the wife's homeland. She, at all events, must have decided that her marriage should be valid by Italian law. The husband came a considerable distance so that both should be married at a civilian ceremony in the chapel of a civilian camp by a civilian priest. The proper inference, in my judgment, is that they intended to submit to the Italian civil law. In fact the marriage is invalid by that law, and in those circumstances I have no hesitation in pronouncing it null and void.

5. (a) To what extent is the notion of submission as used by the courts in *Taczanowska* and *Lazarewicz* a useful test?

(b) Is there somewhere in the background to the notion of submission, an element that might provide some basis for a principled approach?

(c) Remember that a principled approach has to be both predictively useful and faithful to the values that the law exists to forward. Can you develop any good basis for distinguishing *Taczanowska* and *Lazarewicz*?

6. A case similar to both *Taczanowska* and *Lazarewicz* is *Kochanski*, [1958] P. 147, [1957] 3 All E.R. 142. In that case, the court could uphold the validity of the marriage under Polish law as well as under the common law.

A FURTHER HISTORICAL NOTE

The requirement of a valid common law marriage in *Taczanowska* was based on the case of *R. v. Millis* (1844), 10 Ch. & Fin. 534, 8 E.R. 844. That case laid down the rule that a common law marriage required the presence of an episcopally ordained priest. This rule can be shown to be completely wrong on historical grounds though the application of such a rule is both understandable and possibly justifiable on the facts of the case. Millis was charged with the offence of bigamy. He had marries Hester in 1829 in a marriage ceremony conducted by a Presbyterian minister in Ireland. In 1836 he married Jane while Hester was still alive. In 1842 he was charged with bigamy. The issue depended on the validity of Millis' first marriage. The Irish courts had acquitted Millis and an appeal was taken (by way of writ of error) to the House of Lords. Ten judges were called upon to advise the House and six judgments were given. The result was a 3-3

tie on the question of whether the first marriage was valid. Three members of the House held that the marriage was invalid because a valid marriage required the presence of an episcopally ordained priest and a Presbyterian minister was not episcopally ordained. Three others held otherwise. The result of the case was an acquittal on the ground that in such a case, "*semper praesumitur pro negante*", that is, on an appeal the result of a tie is that the appeal is dismissed. Such a fall-back position makes perfect good sense, both as a policy or principle of the common law and a policy or principle of the law of procedure. It also explains why judges sit in odd numbers.

R. v. Millis has always been taken to be authority for the proposition that the presence of an episcopally ordained priest is necessary for the validity of a marriage at common law. An episcopally ordained priest is one consecrated by the laying-on of hands by a bishop in the apostolic succession. Presbyterian and other non-conformist clergy and, of course, non-Christian clergy, would not be episcopally ordained.

None of this analysis explains or justifies an approach that determines the validity of a marriage in post-war Italy of a Polish couple by reference to an Irish bigamy case. There is some justification for refusing to convict Millis; none for holding the marriage of Krystyna and Stanislaw invalid. An example of the rule carried to an extreme is found in *Kuklycz v. Kuklycz*, [1972] V.L.R. 50. Two Ukrainians were married in the Ukraine in 1942 (when the Ukraine was occupied by the Germans). The marriage was performed by a priest of the Russian Orthodox Church. The judge had to decide if such a priest was episcopally ordained. The result of the case, we must assume, would have been different if the officiating person had been instead a Jewish rabbi, or a Moslem or Presbyterian clergyman. It is hard to see, to say the least, why a marriage should be tested in this way. *Kuklycz* contains a useful collection of the cases in this area. The rule is, of course, far too absurd to be applied to invalidate marriages when the court is sufficiently concerned about such a step. See, *Wolfenden v. Wolfenden*, [1946] P. 61; [1945] 2 All E.R. 539 and *Penhas v. Tan Soo Eng*, [1953] A.C. 304 (P.C.). Mendes da Costa argues ((1958), 7 *Int. & Comp. L. Quarterly* 217) in favour of the requirement of an episcopally ordained priest.

All of these issues raise one of the large and largely unexamined problems of the law's approach to marriage. Why should a failure to comply with certain formal rules have any effect on the validity of marriage? What is the purpose of such rules? It can be argued, for example, that the mere presence of s. 31 of the *Marriage Act* means that in cases that do not come within that section, the marriage in question must be invalid. Section 31 is a "curative section" and a curative section is only necessary to "cure" something. That something must be

a marriage that is invalid, so that, as a result of the section, we have a marriage that is valid, but which, were it not for the section, would have been invalid.

At this point it is necessary to introduce yet again some history and some more family law. We have seen that a marriage may be invalid for failure to comply with the required formalities. That is, after all, the result in *Berthiaume v. Dastous*. A marriage may be invalid because of the rules regarding bigamy. This was, for example, the result in *Starkowski*. Such marriages are void. Other marriages are not void but voidable. A voidable marriage, like a voidable contract, is good until it is avoided. Thus a voidable contract can pass good title to a chattel while a void contract cannot.

A marriage that is voidable is one where there is what may be termed a "contract-type" defect. Such defects include things like duress and fraud but, what is of the most practical importance, impotence or inability to consummate. The significance of the distinction between a void and a voidable marriage lies in this: a void marriage is no marriage. Its validity can be attacked by anyone, a party to the marriage, a child of the marriage or anyone else. A party to a void marriage can simply ignore the marriage and re-marry without obtaining a judicial determination of the validity of the marriage. There is, of course, a risk of so doing (this is what Millis for example did) but the important point is that a void marriage can be ignored; no decree is needed to remarry. A voidable marriage, on the other hand, being good or valid until it is avoided, can only be ended by a decree of annulment. Such a decree acts retrospectively: it declares there never to have been a marriage, and does this in spite of the fact that the marriage was good until avoided. The reason for this is the ancient belief of the Roman Catholic (and Anglican) Church that marriage was indissoluble except by death. A marriage could not be valid for a time; it could only be good or bad *ab initio*.

A marriage that is voidable can only be avoided by proceedings brought during the parties' joint lives specifically for that end. A marriage is regarded as voidable or void by the kind of allegation made about it. A marriage that is alleged to be bigamous can be challenged by anyone in the sense that anyone may so allege in any proceedings. Thus in *Starkowski*, Henryka's second child could allege that his mother's and Richard's marriage was void for failure to comply with Austrian law. Of course, an allegation that a marriage is void may not succeed and the marriage may be held to be valid, but it is the allegation that determines the right of a person to bring the challenge. A person who is not a party to the marriage has no standing to challenge it if he or she alleges only the fact of impotence or inability to consummate.

It follows from the difference between void and voidable marriages that a voidable marriage operates very much like a divorce. In form, of course, a decree of annulment does not dissolve a marriage: it merely declares that it never

existed, but in practice, it has many of the features of a decree of divorce. It can only be obtained by a party to the marriage and only if it is expressly sought. The desire of a party to seek an annulment of a voidable marriage is, presumably, influenced by the extent to which the party is satisfied with the marriage. If the parties to a marriage that has not been consummated are content, that is their business, and, so long as they are happy (or happy enough) neither is likely to challenge the validity of the marriage. If one of the spouses dies, the marriage is valid and its validity cannot be challenged by anyone. The surviving spouse is entitled to all the rights of a spouse.

The medieval church at the same time as it steadfastly refused to dissolve a marriage by divorce, multiplied the grounds upon which a marriage could be challenged. The grounds, however, made the marriage voidable and not void, and, as has been mentioned, had the effect of offering divorce, though by another name. If we look at the common law at any time before 1753 (we will explore later just what happened then) we find that there were almost no formal requirements for a valid marriage, and such impediments as there were generally made the marriage voidable not void. In such a setting, the policy in favour of marriage could be seen to be generally forwarded. There were of course certain defects in a marriage that made it void—bigamy, a marriage that was incestuous and marriage of children under the age of 7, but beyond that marriages could only be attacked by the parties to them and only in their joint lives.

The importance of all these rules lies in this. The law cannot make people love each other and be kind to each other. All that the law can do, in general, is to look after property interests. (If a wife was regarded as a husband's property, that interest too could be protected.) The modern problems centre on maintenance and succession rights. A presumption in favour of marriage operates generally to protect reliance and reasonable expectations. It is likely that the common law respected both of these concerns. (There is, of course, the usual circular argument here: what reliance is reasonable? That which the law will protect. What reliance will the law protect? Why, reasonable reliance, of course!) We cannot make too much of the rules and results of the eighteenth century common law as providing useful examples or analogues for today. Society has changed far too much. What is important, however, to notice is that in the common law it appears that very few marriages were void.

This argument returns to the point made in the Notes following *Berthiaume v. Dastous*. There it was pointed out that the result of that case, and the rule laid down in it, did not sit well with the common law. So too, while the result in *Taczanowska* may be correct in England, the reasoning (leading to cases like *Lazarewicz*) is not. The risk of a marriage being invalid in Ontario is small given the presence of s. 31, but it is nevertheless a real risk, even if we leave out of consideration cases where neither party could be said to have reasonably relied

on the validity of the marriage. It may be that domestically in Ontario we have reached a position as regards formal invalidity of marriage very similar to that of the old common law. Yet the contrast is marked when we consider the conflicts rules. Here we are prepared to invalidate when it is very hard to see what social value is achieved thereby. When the rules we are applying make the marriage void, there is real risk of reasonable reliance being defeated. Notice, for example, that the result would have been the same had Mrs. Lazarewicz lived with her husband for 35 years, believing that she was married to him. On his death, her right to succeed as his widow could have been challenged by anyone who might gain from so doing—children, more distant relations, a charity. It is true that under the *Succession Law Reform Act*, ss. 64, 68 she could claim as a "common law" spouse and get some protection if she needed it and to keep her from becoming a public charge, but why should she not have a claim as of right?

We now must consider the possible reasons for requiring that a marriage satisfy certain formal requirements. The first statute in England requiring formalities for marriage was *Lord Hardwicke's Marriage Act* of 1753 (26 Geo. II, ch. 33). The purpose of this act was the prevention of "clandestine marriages". In a period when dynastic marriages were important and when, on marriage, a man would acquire all his wife's property, clandestine marriages could pose a serious risk to love-struck heiresses or gullible rich young men. The interest of parents in preventing such marriages is obvious. The Act of 1753 required the publication of banns, or the obtaining of a special licence and the consent of a parent or guardian in the case of a marriage of a minor. There may well be a value in encouraging publicity as regards a marriage. It is also possible to argue that anyone marrying and not complying with the Act might have had no reasonable reliance on the marriage's being valid. A cursory and random reading of eighteenth and early nineteenth century romances suggests that every girl, at least, was, from her mother's knee, familiar with the requirements of the Act. The Act also provided for very severe penalties on anyone (that is any Anglican priest) celebrating a marriage without banns or special licence and this might have operated to prevent any reasonable reliance by anyone on a marriage made invalid by the Act.

Once again, the problem cases would be those where the parties had lived together for many years in the reasonable belief that their marriage was valid, the invalidity only being discovered after the death of one of them. It is, of course, quite possible that there were such cases. One of the problems of clandestine marriages was the position of third parties, who would find out, to their dismay, that they were married to a bigamist. It is difficult to tell whether the passing of the Act increased or decreased the risk of the defeat of reasonable reliance.

In any event, there may be some rational purpose to legislation like *Lord Hardwicke's Marriage Act*, just as there may be to some of the provisions of the

Ontario Act. A marriage that fails to comply with the requirements of the Act is very likely to be covered by s. 31. (See: *Alspector v. Alspector*, [1957] O.R. 454, 9 D.L.R. (2d) 679 and *Freedman v. Smookler*, [1964] 1 O.R. 577, 43 D.L.R. (2d) 210). A failure of the parties to have parental consent does not invalidate a marriage under *The Marriage Act*. (A marriage of parties below the age of capacity for marriage at common law (12 for girls and 14 for boys) became valid and unimpeachable if it was affirmed after the minimum age was reached. Co-habitation would be affirmation.)

The result of this analysis is to suggest that the traditional conflicts rules are even more harmful than the ones we find in contracts and torts. They have the capacity (and one that is often realized) to defeat expectations and reliance engendered by many years of co-habitation and they do this in a thoroughly unprincipled way. And, of course, they can do nothing else, for the rules formally ignore all the values that the common law of marriage seeks to achieve. Would it have been so terrible to have told Mr. and Mrs. Lazarewicz to get a divorce before either remarried? Should the ready availability of divorce do anything to restrict the scope of the rules making marriages void?

It is very important to note where the foregoing argument has taken us. We start from a jurisdiction-selecting rule of the traditional type, a rule moreover, framed in much more precise terms than, say, the rules regarding the proper law of the contract. Two consequences almost immediately manifest themselves: first, the rule has no principled basis, and second, the courts simply cannot live with it. The effort to develop a principled basis forces us to do precisely what we had to do in both contracts and torts, we had to go back to the underlying social purposes for marriage and the rules regarding marriage. Once we take this step, we are not concerned any more with whether French or Italian law wants to invalidate certain marriages for their own purposes. (Divorce being unavailable in Italy in 1946, it may have been expected that the grounds of invalidity would be far broader than in a jurisdiction where divorce is relatively easier to obtain.) All we are concerned about is that the disputes coming before Canadian courts be sorted out in ways that we would find satisfactory.

If we can, by some manipulation of the escape devices of renvoi (*Kochanski*) or characterization (see, *Ogden v. Ogden*, *infra* p. 97) reach the correct and desirable result within the context of the traditional rules, then we can live with that. The fact that we have to resort to those devices vividly demonstrates, if more demonstration was needed, the utter inadequacy of traditional doctrine. The alternative is the overt recognition of the need to hold marriages valid and of the fact that we have to take this step because we care very much about what happens to this woman, this man or this child. We have to be convinced that we have no choice but to invalidate if the rules so require. In a sense, this argument is interest analysis carried to its limit. We consider almost exclusively the point of

view of the forum and we have a clear basis for resolving true conflicts: we apply forum law.

How compatible is the analysis with the analysis of Currie and Cavers that we examined earlier? It has been suggested that the result of the analysis of the cases and principles that has been developed is interest analysis carried about as far as it can go. The difficulty we face in marriage cases is, however, quite unlike that in contracts or torts. There are a number of reasons for this feature of the rules. The first reason is that as in *Berthiaume v. Dastous* we have to dig far below the surface to discover that the case is a false conflict. At a superficial level we can say that while Quebec law requires no civil ceremony, French law does. French law, as we may assume, has good reasons for this requirement. But the case is not really over a conflict of rules regarding marriage; it is a question of support or maintenance. At this level, we find that both systems, Quebec and France, (and the common law as well, for that matter) would regard what happened as sufficient to confer on the parties to the marriage obligations of support. If we ask, therefore, whether any legal system is concerned to deny rights of support to this woman, the answer is the same in all jurisdictions.

If *Berthiaume v. Dastous* should arise in B.C. or Ontario, the problem we have is that we are really quite unconcerned about the purposes behind the French rule invalidating the marriage. We can hardly imagine a reason why a failure to comply with any formality of the type in *Berthiaume v. Dastous* should deny a wife *who has relied on the marriage* rights of support (or succession) as a spouse. This attitude is justified if at the time we investigate the issues we can regard the marriage as a "Canadian" marriage. If the issue could be presented to a Canadian court while the marriage remained a French marriage (or, more precisely, a French relationship) we might care less about validating it, and be prepared to regard it as invalid. So long as the marriage is (or has become) a Canadian marriage we simply deny that any foreign law can defeat the strong interest of the forum in giving the spouses those rights that they would have if they had always been nothing but Canadian spouses. The forum interest represented by s. 31 of the Ontario act or s. 16 of the B.C. act will *always* prevail over the foreign contrary interest. It is in this sense that the proposed rules can be said to carry interest analysis about as far as it can be taken.

We could imagine a true conflict if we could be convinced that some value of French law would be forwarded by denying support to this woman. There are such cases—or they can be imagined—but they raise issues of bigamy. Thus, suppose that after the marriage in *Berthiaume v. Dastous*, the husband relying on the invalidity of the ceremony in Paris, had married a French woman and on his death both women sought to succeed to property he had in Canada where the first "spouse" was then living. Do we accept the invalidity of the first French ceremony to permit us to regard the second as valid? Do we ignore the claim of

the second wife because she is bigamously married by our standards? These are hard questions. We want to protect the Canadian wife, but if we regard her marriage as invalid because of the failure to comply with French rules of formal validity, do we threaten any similar Canadian wife even when there has been no subsequent marriage? The second wife may well present a very strong claim to have us protect her reasonable reliance on her marriage.

As these questions have been put they do not offer any easy solution. But notice how the issues are presented. The claims of the two women are essentially *property* claims. It is an issue of which woman has title to the asset that is the husband. The true conflict arises not over the rules of valid marriage, but over the fact that we might prefer the first wife while the second wife is preferred by France. Looked at in this light we may have to recognize that an excessively forum centred approach along Currie's lines is unjustified. We may have no choice but to recognize the second wife as the true owner. The analogy of property cases may be disturbing, but the question remains whether there is any alternative. The intensity of the problem is diminished if, as is the case in Ontario, and to a lesser extent in B.C., we can give both women a share. Similarly, if French law also gave some protection to the first wife, our problems are far less. It is useful to be able to avoid an all or nothing result.

None of these issues are brought out by the traditional rules. They fail to find any basis for reaching any kind of even remotely satisfactory solution. Our choice of law process is not between rules but between groups of rules, regimes of spousal support. We only have problems if there is a clear difference in the results reached by the whole group of French rules regarding marriage and the equivalent Canadian rules. Interest analysis gives us not much more help here than do the traditional rules.

NOTE ON AMERICAN LAW

The Restatement rules in marriage and property are interesting.

> **Marriage**
>
> **§ 283. Validity of Marriage**
>
> (1) The validity of a marriage will be determined by the local law of the state which, with respect to the particular issue, has the most significant relationship to the spouses and the marriage under the principles stated in § 6.
>
> (2) A marriage which satisfies the requirements of the state where the marriage was contracted will everywhere be recognized as valid unless it violates the strong public policy of another state which had the most significant relationship to the spouses and the marriage at the time of the marriage.

[§ 6 is, as we have seen, the general choice of law rule "factored" out of the individual sections of the Restatement Second. It provides:

> **§ 6 Choice of Law Principles**
>
> (1) A court, subject to constitutional restrictions, will follow a statutory directive of its own state on choice of law.
>
> (2) When there is no such directive, the factors relevant to the choice of the applicable rule of law include:
>
> (a) the needs of the interstate and international systems;
>
> (b) the relevant policies of the forum;
>
> (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue;
>
> (d) the protection of justified expectations;
>
> (e) the basic policies underlying the particular field of law;
>
> (f) certainty, predictability and uniformity of result, and
>
> (g) ease in the determination and application of the law to be applied.]

The comment to § 283 provides;

> **Comment:**
>
> *a. Scope of section.* The rule of this Section is concerned with what law governs the validity of a marriage as such, namely with what law determines, without regard to any incident involving the marriage, whether a man and a woman are husband and wife. As stated in the Introductory Note to this Chapter, the validity of a marriage as such may be exclusively involved in an action for an annulment, in an action for a declaratory judgment that a marriage does or does not exist and in a criminal prosecution for bigamy. As also stated in the Introductory Note, the courts have usually acted on the assumption that a decision of questions involving the incidents of a marriage should be preceded by a determination of the validity of the marriage.
>
> **Comment on Subsection (1):**
>
> *b. Rationale.* The principles stated in § 6 underlie all rules of choice of law and are used in evaluating the significance of a relationship, with respect to the particular issue, of the potentially interested states to the transaction and the parties. The factors listed in Subsection (2) of the rule of § 6 can be divided into five groups. One group is concerned with the fact that in multistate cases it is essential that the rules of decision promote harmonious and beneficial

relationships in the interdependent community, federal or international. The second group focuses upon the purposes, policies, aims and objectives of each of the competing local law rules urged to govern in having their rules applied. The factors in this second group are at times referred to as "state interests" or as appertaining to an "interested state."

i. Marriage which does not meet the requirements of the state where it was contracted. Upholding the validity of a marriage is, as stated in Comment *b*, a basic policy in all states. The fact that a marriage does not comply with the requirements of the state where it was contracted should not therefore inevitably lead to the conclusion that the marriage is invalid. To begin with, the requirement that was not satisfied may not be mandatory, at least in the case of a marriage between nonresidents, in the state where the marriage was contracted with the result that the marriage would be valid even under the local conceptions of that state. But even if the requirement is a mandatory one, the marriage should not necessarily be held invalid in other states provided that it would be valid under the local law of some other state having a substantial relation to the parties and the marriage. The marriage should not be held invalid in such a case unless the intensity of the interest of the state where the marriage was contracted in having its invalidating rule applied outweighs the policy of protecting the expectations of the parties by upholding the marriage and the interest of the other state with the validating rule in having this rule applied.

The state where the marriage was contracted has a substantial interest in having persons who marry within its territory comply with its local requirements as to formalities at least to the extent that these requirements are mandatory. As to such mandatory requirements, the state where the marriage was contracted may well be the state of dominant interest and, if so, there is good reason for its invalidating rule to be applied.

The state where the marriage was contracted will probably have no similar interest in the application to a marriage between non-residents of such of its marriage rules as do not relate to formalities. So, for example, there would seem to be little reason to invalidate a marriage between first cousins by application of a rule of the state where the marriage was contracted if such a marriage would be valid under the local law of the state where the parties were domiciled both before and immediately following their marriage. Upholding the validity of the marriage in such a case by application of the validating rule of the state of domicil would seem required by the fact that the latter state has the dominant interest in the issue to be decided and by the choice-of-law policy which favors protection of the justified expectations of the parties by upholding the marriage.

j. Marriage which does not satisfy requirements of state of most significant relationship. The interplay of the two factors mentioned in Comment *b*—protection of the justified expectations of the parties and implementation of the relevant policies of the state with the dominant interest in the determination of the particular issue—leads to the rule that a marriage which meets the requirements of the state where the marriage was contracted will everywhere be recognized as valid except when to do so would violate the strong policy of another state which had the most significant relationship to the spouses and the

marriage at the time of the marriage. To date, a marriage has been held invalid in such circumstances only when it violated a strong policy of a state where at least one of the spouses was domiciled at the time of the marriage and where both made their home immediately thereafter. Such a state may have an interest sufficiently great to justify the invalidation of a marriage which meets the requirements of the state where it was contracted. Only a strong policy of this state, however, would justify application of its rule to invalidate a marriage. Upholding the validity of marriages is a basic policy in all states, and the courts of the state of most significant relationship would not themselves invalidate an out-of-state marriage between local domiciliaries which met the requirements of the state where it was contracted except when required to do so by a strong policy. As to the criteria for determining whether a policy is a strong one, see Comment *k*.

k. *Marriage contrary to a strong policy of state of most significant relationship.* For reasons stated in Comment *j*, a marriage which satisfies the requirements of the state where it was contracted will be held valid everywhere except when its invalidation is required by the strong policy of another state which had the most significant relationship to the spouses and the marriage at the time of the marriage. To date, as stated in Comment *j*, a marriage has only been invalidated when it violated a strong policy of a state where at least one of the spouses was domiciled at the time of the marriage and where both made their home immediately thereafter. The forum will apply its own legal principles in determining whether a given policy is a strong one within the meaning of the present rule.

The problem arises in a situation where the marriage does not satisfy the requirements of the state of most significant relationship and where as a result the marriage would have been invalid if it had been contracted in that state. The task of the forum is to determine whether the requirement or requirements that were not satisfied represent a sufficiently strong policy of the state of most significant relationship to warrant invalidation of the marriage. The prime question for the forum to determine in that connection is whether the courts of the state of most significant relationship would themselves have invalidated the marriage if the question had come before them. For if these courts would not have invalidated the marriage, it is apparent that in the eyes of these courts themselves the policy represented by the local rule or rules that were not satisfied is not sufficiently strong to warrant invalidation of the marriage. The forum should not give greater weight to this policy than would the courts of the state of most significant relationship.

In determining whether the courts of the state of most significant relationship would have invalidated the marriage the forum will first consult the statutes of that state. Some states have statutes which invalidate in specified circumstances the out-of-state marriage of local domiciliaries. If the marriage comes within the provisions of such a statute, it is clear that it would be held invalid in the state of most significant relationship and the forum will hold it invalid likewise, subject to the considerations stated below. If the state of most significant relationship has no such statute, the forum will next inquire whether the marriage would be held invalid by the courts of that state by application of their choice-of-law rules. If it can be determined from the prior decisions of these

courts that they would have held the marriage invalid, the forum will do likewise, subject again to the considerations stated below. If, however, no clear answer can be obtained from the statute or from the decisions of the courts of the state of most significant relationship, the forum must use its own judgment in determining whether the rule that was not satisfied represents a sufficiently strong policy of the state of most significant relationship to warrant invalidation of the marriage. Rarely, if ever, would the forum find such a policy in a rule relating to formalities (see Comments *f* - *g*). Indeed in the absence of explicit statute or judicial precedent in the state of most significant relationship, the only rules that the forum would be likely to find embody a sufficiently strong policy of that state to warrant invalidation of an out-of-state marriage are rules which prohibit polygamous marriages, certain incestuous marriages, or the marriage of minors below a certain age. The fact that the marriage was incestuous under the local law of the state of most significant relationship would not of itself be enough to cause the forum to invalidate the marriage. In the absence of explicit statute or judicial precedent to the contrary in the state of most significant relationship, the forum would be unlikely to find that a rule against incest represented a sufficiently strong policy to warrant invalidation of the marriage except where the persons involved were in so close a relationship as brother and sister and perhaps uncle and niece.

The time of the bringing of the action which questions the validity of the marriage may have an important bearing upon whether a strong policy of the state of most significant relationship is involved. If the action is brought at a time when both spouses are still domiciled in that state, the interest of that state in the spouses is apparent and its strong policy may be involved in the circumstances discussed above. The situation may well be different, however, if the action involving the validity of the marriage is brought at a time when both of the spouses have moved from the state. Here the interest of this state in the application of its invalidating rule would, usually at least be less than it was at the time when the spouses were still in the state. It is unlikely that, unless required to do so by statute, the courts of this state would invalidate the marriage by application of their local rule. And even if these courts would do so, whether by reason of statute or otherwise, it is probable that the forum would find that, by reason of the removal of the spouses, the state no longer had a sufficient interest in the application of its rule to warrant invalidation of the marriage.

§ 244. Validity and Effect of Conveyance of Interest in Chattel

(1) The validity and effect of a conveyance of an interest in a chattel as between the parties to the conveyance are determined by the local law of the state which, with respect to the particular issue, has the most significant relationship to the parties, the chattel and the conveyance under the principles stated in § 6.

(2) In the absence of an effective choice of law by the parties, greater weight will usually be given to the location of the chattel, or group of chattels, at the time of the conveyance than to any other contact in determining the state of the applicable law.

§ 247. Moving Chattel into Another State: Effect on Title

Interests in a chattel are not affected by the mere removal of the chattel to another state. Such interests, however, may be affected by dealings with the chattel in the other state.

§ *251. Validity and Effect of Security Interest in Chattel*

(1) The validity and effect of a security interest in a chattel as between the immediate parties are determined by the local law of the state which, with respect to the particular issue, has the most significant relationship to the parties, the chattel and the security interest under the principles stated in § 6.

(2) In the absence of an effective choice of law by the parties, greater weight will usually be given to the location of the chattel at the time that the security interest attached than to any other contact in determining the state of the applicable law.

§ *252. Moving Chattel into Another State: Effect on Security Interest*

A security interest in a chattel neither gains nor loses validity by the mere removal of the chattel to a second state. Interests in the chattel may, however, be affected by dealings with the chattel in the second state.

NOTES, QUESTIONS AND PROBLEM

1. A relation of marriage is, of course, far different from a property relation. There is, however, an analogy that can be drawn. No court can make anyone love another person or even be kind to her or him; courts can usually only deal with rights to support or succession—claims that are, in essence, financial and largely indistinguishable from proprietary claims. The relevance of these sections is that the husband in the example based on *Berthiaume v. Dastous* can be regarded either as a chattel, title to which has been vested in W2, or as a chattel in which W1 has a security interest challenged by the claim of W2. It might make a difference if you were to consider the claim of either W as an equitable claim, rather than a legal one.

2. Consider how well any analysis of the conflicts problems of marriage will operate if the concept of marriage should differ greatly between the two societies involved. As a matter of fact, are there regimes found in the world that differ very substantially from ours?

3. Richard and Irene, two Poles living in Italy in 1946, were married in circumstances similar to those in *Taczanowska*. They left Italy and came to France. While in France they were told by a lawyer that under French law their marriage was invalid. They agreed to separate. Irene went first to England and then came to Ontario where she married Michael in 1952. Michael died in 1981.

Irene's right to succeed as Michael's widow is challenged by Michael's two children. Who wins and why?

Chapter 4

Parental Consent

Issues of parental consent are usually dealt with as part of the law regarding the formalities of marriage. As we shall see, there is an important issue of characterization here and it is best not to pre-judge the matter.

The B.C. *Marriage Act* provides:

> 24. (1) Except as provided in subsections (2) to (4), no marriage of a person, not being a widower or widow, who is a minor shall be solemnized, nor shall a licence be issued, unless consent in writing to the marriage is first given
>
> (a) by both parents of that person if both are living and are joint guardians, or by the parent having sole guardianship if they are not joint guardians or by the surviving parent if one of them is dead;
>
> (b) in case both parents are dead, or if neither parent is a guardian, by a lawfully appointed guardian of that person; or
>
> (c) in case both parents are dead, and there is no lawfully appointed guardian, by the Public Trustee or the Supreme Court or any County Court.
>
> (2) In case any person whose consent under this section is required to any marriage is out of the Province, or unreasonably or from undue motives refuses or withholds his consent to the marriage, or in case his whereabouts is unknown and the court is satisfied that diligence has been exercised to ascertain the whereabouts, the person in respect of whose marriage consent is required may apply by petition to the Supreme Court or to any County Court for a declaration under this section.
>
> (3) The court applied to shall proceed on the petition in a summary manner, and if the marriage proposed appears on cause shown to be proper, the court shall judicially declare it to be proper, and its judicial declaration shall be as effectual for all purposes as if the person whose consent is required had consented to the marriage.
>
> (4) Where a person whose consent is required under this section is a mentally disordered person, the Public Trustee may, if the proposed marriage appears to be proper, consent to the marriage.
>
> (5) The consent required by subsection (1) or the declaration of a court under subsections (2) and (3) shall, before a licence is issued authorizing the solemnization of the marriage, be filed with the issuer of marriage licences; or, in case the marriage is to be solemnized by a minister or clergyman after publication of banns, shall be filed with the minister or clergyman.
>
> (6) No marriage of any person who is a minor shall be solemnized, nor shall a licence be

> issued, unless a certificate of birth or other satisfactory proof of age has been produced to the issuer of marriage licences; or, in case the marriage is to be solemnized after the publication of banns, to the minister or clergyman.
>
> 25. (1) Except as provided in subsections (2) and (3), no marriage of any person under the age of 16 years shall be solemnized, nor shall a licence be issued.
>
> (2) Where, on application to the Supreme Court or any County Court, a marriage is shown to be expedient and in the interests of the parties, the court may, in its discretion, make an order authorizing the solemnization of and the issuing of a licence for the marriage of any person under the age of 16 years.

The absence of parental consent to a marriage in B.C. or Ontario is not an important issue insofar as its absence will not invalidate a marriage. In conflicts analysis, issues of parental consent are important for two reasons. The first is that some of the cases illustrate very neatly the problem of characterization as it has developed in traditional English conflicts analysis. The second is that the resulting conflicts rules may make an issue of consent important.

The development of the common law position is a very interesting approach to marriage. One of the reforms introduced by *Lord Hardwicke's Marriage Act* was the requirement of parental consent for the marriage of minors. The Act, however, only applied to England. In Scotland, the old rules of the canon law applied. A marriage would be created by consent (promise) before witnesses and no other requirements existed. A young couple, one of whom, at least, was a minor who could not get married in England because of parental disapproval for the match, could get married in Scotland. Gretna Green was the first settlement north of the border in Scotland on the main highway from England to Scotland. An accommodating blacksmith would, for a fee no doubt, agree to be a witness at the marriage of young English couples. It was inevitable that the legality of such a marriage would be challenged. In *Compton v. Bearcroft* (1769), 2 Hag. Con. 444n, 161 E.R. 799, a "Gretna Green" marriage was held to be valid in England. The popularity of Gretna Green lasted until 1856 when the Scottish form of marriage was only available to those who had spent three weeks in Scotland. No one in his or her right mind would spend three weeks at Gretna: there was no place to hide from an irate parent and nothing to do. It was wiser to travel on to the flesh-pots and gay life of Edinburgh. In 1939 all such marriages were abolished in Scotland.

The refusal of the English courts to invalidate Gretna Green marriages was based on the view that the validity of a marriage was governed by the law of the place of celebration. This conclusion was summed up in a Latin tag: "*locus regit actum*". When conflicts rules were developed more fully in the nineteenth century, and the distinction between formal validity and other matters was developed, the Gretna Green rule had to be reconciled to the new choice of law terminology. Since Gretna Green marriages were valid, it followed that the issue of parental consent was a matter determined by the *l.l.c.* Therefore, parental consent was a matter of form, for the *l.l.c.* governed matters of form. Here we see the device of characterization used in a result-selective way. We characterize appropriately to reach the result that we want. Early cases developing this approach were *Scrimshire v. Scrimshire* (1752), 2 Hag. Con. 395 and

Simonin v. Mallac (1860), 2 Sw. Tr. 67. The next case illustrates the developed approach of the English law.

Ogden v. Ogden
[1908] P. 46
(C.A., Cozens-Hardy M.R., Sir Gorell Barnes P.
and Kennedy L.J.)

APPEAL from a decision of Bargrave Deane J.

The question raised by this appeal was the effect of a decree of nullity of marriage by a French Court on a marriage solemnized in England between a domiciled Englishwoman and a domiciled Frenchman temporarily residing in England.

The facts as stated by Sir Gorell Barnes in the judgment of the Court of Appeal were as follows: The appellant, an Englishwoman who was domiciled in England, and whose maiden name was Sarah Helen Williams, on September 14, 1898, went through the ceremony of marriage at the registry office at Prestwich, in the county of Lancaster, with one Léon Philip, who was a French subject having a French domicil. At the time of the said ceremony he was temporarily resident in England in order to study English commerce and learn the English language. The ceremony took place without the knowledge either of his parents or of her parents. According to the marriage certificate, the appellant's age appears to have been twenty-five, and Philip's age was stated to have been twenty-two years, but as a matter of fact he was only nineteen. For a short time after the marriage the parties cohabited in England, and then it appears that the marriage became known to the appellant's father who communicated with Léon Philip's father in France. In the result Philip's father came over to this country and took his son to France, where he has ever since remained.

The appellant became pregnant, by Léon Philip, of a child, which was born on July 7, 1899. Afterwards Léon Philip's father instituted proceedings in France to have the marriage annulled in accordance with certain provisions of the French Civil Code, to which it will be necessary to refer hereafter.

It is to be gathered from the decree of the French Court that the appellant made a claim that the marriage should take civil effect, and for alimony, and also for an allowance for the support of the child.

On November 5, 1901, a decree was pronounced in the proceedings at the Civil Tribunal of First Instance of the Seine, which recorded as to Léon Philip that, having come of age, he appeared personally in the proceedings, and, dealing with M. Philip, senior's application to annul the marriage, the decree, after reciting that Léon Philip contracted the marriage in England at the age of nineteen years with Sarah Helen Williams, aged twenty-five years, on September 14, 1898, and that he could not by reason of his age marry without the consent of his father, his only surviving parent, and that he did not ask such consent; that, on the other hand, the said marriage was not preceded by any publication in France; that it is certain that such omission was intentional on the part of Léon Philip and Sarah Helen Williams, and with the object of eluding the

legal wife, and therefore not the wife of the petitioner; but we must arrive at the decision of this case by applying general principles which ought to be considered in any case which may arise where a marriage has taken place in this country between an English subject domiciled in England and a foreigner domiciled abroad, and the right remedy to look forward to is a recognition by the agreement of civilized countries of the principle that the omission of formalities required by the law of one country, but not by the law of the country where a marriage is celebrated, ought not to be allowed to affect the validity of the marriage in the country requiring such formalities. . . .

NOTES AND QUESTIONS

1. *Cheshire & North*, 12th ed. (1992), pp. 50-51, is very critical of the judgment in *Ogden*:

In *Ogden v. Ogden*, however, the relevant French rule was to this effect:

> The son who has not reached the age of twenty-five cannot contract marriage without the consent of his father and mother.

Although it seems almost unarguable that the object of this provision was to impose a total incapacity upon the parties unless they obtained parental consent, the Court of Appeal held the marriage to be valid, since the ceremony had been performed in accordance with the requirements of English law, the law of the place of celebration. The later marriage between the respondent and the Englishman was therefore bigamous. It is submitted that this case was not on the same footing as *Simonin v. Mallac*, and that it is opposed to established principles. For the English court to classify the rule as formal was in effect to infringe the principle that the essential validity of a marriage falls to be determined by the law of the domicil. The most unfortunate feature of *Ogden v. Ogden* is its suggestion that every rule requiring parental consent to a marriage must be classified as formal.

Bona vacantia An outstanding example of a foreign rule being construed in its context with the view of deciding whether it fell within the sphere of control of the foreign governing law is afforded by *Re Maldonado's Estate*, [1954] P. 223, [1953] 2 All E.R. 1579, where the facts were these:

> A person died intestate domiciled in Spain leaving assets to the extent of some £26,000 in England. By Spanish law those assets passed to the Spanish State, since the deceased left no relatives entitled to take them by way of succession.

The English rule for the choice of law applicable to this factual situation is that intestate succession to movables must be determined according to Spanish law as being the law of the domicil. Therefore, the sphere of control of Spanish law in the instant case was confined to matters of succession, and the problem was whether the Spanish rule under which the assets passed to the State was to be classified as a rule of succession.

> At this point it is pertinent to notice that, though the movables of a deceased owner who dies intestate without leaving recognized successors pass to the State in the great majority of countries, yet the capacity in which the State takes is not uniform throughout the world. In some countries, such as Italy and Germany, it is regarded as an heir taking by way of succession; in others, such as Turkey, Austria and formerly England, it acts in its capacity as the paramount sovereign authority and confiscates the movables as being bona vacantia, ownerless goods. If, for example, the deceased dies domiciled in Turkey, the Turkish law, since it governs only questions of succession and since it does not regard the State as a successor, has no say in the matter and movables found in England pass to the Crown.

2. *Castel*, 2nd ed., for example in discussing the issue of parental consent, p. 285 says: (footnotes omitted)

> A requirement of parental consent to the marriage, whether imposed by provincial or foreign law, is regarded as a matter of form.

3. Suppose that Sarah and Léon had remained in England and that Léon had died in 1950 leaving a large estate. Should Sarah be entitled to succeed as his widow or not?

4. Notice how the issue of characterization has been transformed in the hands of the academics. The early cases had characterized in order to support the validity of a marriage. Now characterization is carried on in the abstract. Neither *Cheshire & North* nor *Castel* are bothered at all by the *result* of the process they are discussing. Why should an English court support the extraordinarily wide powers of the French *pater familias*? Is there an argument that the provisions of the French Civil Code enshrine an idea of marriage that may even have been an anachronism in 1908? See, Glendon *The New Family and the New Property* at pp. 32-33.

5. What other information would you want about French law before you would feel comfortable in determining the problems of Sarah and Léon?

6. The decision not to recognize the French decree of annulment is indefensible and the same result on this issue would not now follow. This would mean that Sarah's marriage to Léon would no longer be an impediment to any subsequent marriage.

7. At the date of the case, Sarah could not have obtained a divorce in England and, of course if she went back to France, there would be no marriage to dissolve. The effect of the case is to put her in some kind of marital limbo: married but not married and unable to do anything about it.

8. There are some constitutional problems arising in the Canadian context. Only the provinces have legislated as regards the requirement of parental consent. The provincial power comes from s. 92(12) of the *Constitution Act* which refers to the solemnization of marriage *in the province*. The Supreme Court of Canada has upheld the power of a province to invalidate a marriage for lack of parental consent: *A.G. Alberta & Neilson v. Underwood*, [1934] S.C.R. 635; [1934] 4 D.L.R. 167. A marriage taking place between two persons domiciled in Alberta (where parental consent is required) in Ontario would seem to offer the same facts as the Gretna Green marriages and to be valid. Federal legislation could affect the validity of marriages taking place outside Canada.

9. There is a Quebec case, *Agnew v. Gober* (1910), 38 C.S.C. 313, (Cour de révision) where a marriage that was celebrated in Kingston, Ontario was held invalid for failure to obtain parental consent. The action was brought by the husband's parents. No mention is made of the constitutional question, namely the scope of the Civil Code provisions in geographically complex cases, given s. 92(12).

Chapter 5

Matters Other Than Formal Validity

These issues are sometimes referred to as issues of capacity or essential validity. There are two questions to answer:

1. Can both of the parties marry anyone?

2. Can the parties intermarry?

A person who is below the age for marriage cannot marry anyone. Some countries prohibit priests of the Roman Catholic church from marrying. People who are already married cannot marry another until the first marriage is ended by divorce or death. People who are closely related to each other may be unable to marry. The conflicts problems we face centre on the usual two features of the cases. What is the traditional choice of law rule to govern capacity to marry? How can we make sense of it, or understand how it really operates?

The next case was the first to develop the distinction between formal validity and other matters and to apply a different choice of law rule than that all issues of marriage were to be governed by the *l.c.c.*

Brook v. Brook
(1861), 9 H.L.C. 193, 11 E.R. 706,
(House of Lords)

William Leigh Brook, of Meltham Hall, in the county of York, married in May, 1840, at the parish church of Huddersfield, in Yorkshire, Charlotte Armitage. There were two children of that marriage, Clara Jane Brook and James William Brook. In October 1847, Mrs. Brook died. On the 7th June 1850, William Leigh Brook was duly, according to the laws of Denmark, married at the Lutheran church at Wandsbeck, near Altona, in Denmark, to Emily Armitage, the lawful sister of his deceased wife. At the time of this Danish marriage, Mr. Brook and Miss Emily Armitage were lawfully domiciled in England, and had merely gone over to Denmark on a temporary visit. There were three children of this union, Charles Armitage Brook, Charlotte Amelia Brook, and Sarah Helen Brook. On the 17th September 1855, Mrs. Emily, the second wife of Mr. Brook, died at Frankfort of cholera, and two days afterwards Mr. Brook himself died of the same complaint at Cologne, leaving all the five children him surviving.

Mr. Brook, in the early part of the day on which he died, executed a will, by which he disposed of his property among his five children, and appointed his

NOTES

1. It is impossible for us now to understand the attitude of nineteenth century English society to the kind of marriage that occurred in *Brook v. Brook*. It says something about the whole affair that the problem was mentioned by both Shakespeare and W.S. Gilbert. The efforts to reform the law are both hilarious and tragic. The (nearly unbelievable) story is told in E.S. Turner, *Roads to Ruin*, Pelican Books, pp. 110-123.

2. The rule in England was changed by the *Deceased Wife's Sister's Marriage Act* in 1907. In 1921 a woman was allowed to marry her deceased husband's brother. In 1931 the same law was further broadened. The *Marriage Enabling Act*, 1960 sets out the modern law:

> S. 1-(1) No marriage hereafter contracted (whether in or out of Great Britain) between a man and a woman who is the sister, aunt or niece of a former wife of his (whether living or not), or was formerly the wife of his brother, uncle or nephew (whether living or not), shall be reason of that relationship be void or voidable under any enactment or rule of law applying in Great Britain as a marriage between persons within the prohibited degrees of affinity.
>
> (2) In the foregoing subsection words of kinship apply equally to kin of the whole and of the half blood.
>
> (3) This section does not validate a marriage, if either party to it is at the time of the marriage domiciled in a country outside Great Britain, and under the law of that country there cannot be a valid marriage between the parties.

It was not until this legislation that a man was able to marry his divorced wife's sister.

In Canada, the law was initially changed by the *Marriage Act*, R.S.C. 1985, c. M-2:

> s. 2. A marriage is not invalid merely because the woman is a sister of a deceased wife of the man, or a daughter of a sister or brother of a deceased wife of the man.
>
> s. 3. A marriage is not invalid merely because the man is a brother of a deceased husband of the woman, or a son of a brother or sister of a deceased husband of the woman.

This brief statute was first enacted in 1882 to avoid a potential embarrassment to Sir Alexander T. Galt. Sir John A. Macdonald intended to send Galt to England to act as Canada's first High Commissioner to that country, but Galt had married his deceased wife's sister. It was feared that Lady Galt might not be welcomed at court so Macdonald had Parliament pass the *Marriage Act*. However Queen

Victoria had already concluded that since Galt's marriage had taken place in the United States (where women could legally marry their deceased sister's widower and where, according to the views of most right-thinking Englishmen, it was the cause of everything wrong with that society, including the rate of crime) it was a valid marriage. Did Queen Victoria have her conflicts law right?

3. Until recently the prohibited degrees of marriage in Canada were, with the exception of the matter dealt with in the previous paragraph, the same as those in England. They were set out in the following schedule to Ontario's *Marriage Act*, R.S.O. 1990, c. M.4:

FORM 1
(Section 19)

Degrees of Affinity and consanguinity which, under the statutes in that behalf, bar the lawful solemnization of marriage.

A man may not marry his	A woman may not marry her
1. Grandmother	1. Grandfather
2. Grandfather's wife	2. Grandmother's husband
3. Wife's grandmother	3. Husband's grandfather
4. Aunt	4. Uncle
5. Wife's aunt	5. Husband's uncle
6. Mother	6. Father
7. Step mother	7. Step Father
8. Wife's mother	8. Husband's father
9. Daughter	9. Son
10. Wife's daughter	10. Husband's son
11. Son's wife	11. Daughter's husband
12. Sister	12. Brother
13. Granddaughter	13. Grandson
14. Grandson's wife	14. Granddaughter's husband
15. Wife's granddaughter	15. Husband's grandson
16. Niece	16. Nephew
17. Nephew's wife	17. Niece's husband

The relationships set forth in this table include all such relationships, whether by the whole or half blood.

4. Section 33 of the B.C. *Marriage Act* provides that the law of Eng-

land as of November 19, 1958 applies to all matters not covered by the Act. The prohibited degrees would be in this category. The law in B.C. was, therefore, the same as that in Ontario.

5. All this was changed when the Parliament of Canada enacted the following statute (S.C. 1990, c. 46, R.S.C. 1985, c. M-2.1), which came into force on December 17, 1991:

> 1. This Act may be cited as the *Marriage (Prohibited Degrees) Act*.
>
> 2.(1) Subject to subsection (2), persons related by consanguinity, affinity or adoption are not prohibited from marrying each other by reason only of their relationship.
>
> (2) No person shall marry another person if they are related
>
> (a) lineally by consanguinity or adoption;
>
> (b) as brother and sister by consanguinity, whether by the whole blood or by the half blood; or
>
> (c) as brother and sister by adoption.
>
> 3.(1) Subject to subsection (2), a marriage between persons related by consanguinity, affinity or adoption is not invalid by reason only of their relationship.
>
> (2) A marriage between persons who are related in the manner described in paragraph 2(2)(a), (b) or (c) is void.
>
> 4. This Act contains all of the prohibitions in law in Canada against marriage by reason of the parties being related.
>
> 5. [This section repealed the *Marriage Act* (supra, note 2).]

6. This legislation replaces the former law, though just what its effect on the common law rules is is not immediately clear. The provinces cannot legislate in regard to the prohibited degrees. This is reserved to Parliament under s. 91(26) of the *Constitution Act, 1867.*

7. As we have seen, it is a serious thing to hold a marriage void (as opposed to voidable) and a significant part of the recent reforms in family law in Canada has been devoted to undoing the harms of this. (Notice that the new federal legislation limits the marriages that are void.) The problems that we have stem directly from the fact that we regard marriage as a status, and as providing a comprehensive answer to a wide range of questions. Does it follow, because

we say that a marriage of an uncle and niece is void, that a woman who has lived with a man for 50 years should be denied the right to succeed as his widow because the marriage is within the prohibited degrees? There are two quite different problems here. The first is the issue of whether Ontario is offended by the idea that an uncle and niece are getting married, and the second is whether a woman can succeed to a man's estate. There is no reason why both questions should be answered by the same fact.

8. The historical development of the law is touched on in *Brook v. Brook* (*supra*, p. 107) and *Feiner v. Demkowicz* (*infra*, 137).

9. The crucial problem from a conflicts point of view is the development of a method for handling the choice of law problem implicit in *Brook v. Brook*. Two choice of law rules have been deduced from Lord Campbell's judgment. The first is referred to as the "dual domicile" theory. It stems from Lord Campbell's statement, p. 121: ". . . the essentials of the contract depend on the *lex domicilii*, the law of the country in which the parties are domiciled at the time of the marriage . . .". It is said to require that both parties must have capacity to marry each other by the law of the respective ante-nuptial domicile. (The phrase "ante-nuptial" has been traditionally used to avoid the wife's domicile's effect being swallowed up in her acquisition of her husband's on marriage.) This theory has been generally championed by *Dicey and Morris*. It finds expression in Rule 33 (10th ed. p. 285) which states:

> capacity to marry is governed by the law of each party's antenuptial domicile.

(There are a number of exceptions listed, that we will look at shortly.) An example of a Canadian court applying this rule is *Dejardin v. Dejardin*, [1932] 2 W.W.R. 237 (Man. K.B.), where a nephew-aunt marriage celebrated in New York was, after 19 years of 'marriage', declared to be void. The court cited *Brook v. Brook* as standing for the propostion that "essentials of the contract depend upon the *lex domicilii*" (at 239), and since at the time the marriage was entered into the nephew had been domiciled in Manitoba the marriage was adjudged void. The second choice of law rule that can be deduced from Lord Campbell's judgment is based on the words immediately following the previous quotation, ". . . and in which the matrimonial residence is contemplated." This theory is known as the "intended matrimonial home" theory. It is said to require that the parties have capacity by the law of the place where they intend to live. It is associated with *Cheshire*, and has the illusion of being functionally related to something.

10. On the facts of *Brook v. Brook* both theories reached the same result: the marriage would be invalid. Mr. and Mrs. Brook were both domiciled

in England and intended to return there. An exciting academic dispute followed the publication of Cheshire's book in 1935 with the participants eagerly scoring points as the judges decided the cases or as they claimed earlier cases supported their views. The following is a summary of the score (as recorded by *Cheshire & North*, 11th ed. pp. 578-585):

Case	*C & N*	*D & M*	Ties
*Brook v. Brook** (1861) England			X
Mette v. Mette (1859) England			X
In the Will of Swan (1871) Australia	X		
*De Reneville v. De Reneville** (1948) England	X		
Kenwood v. Kenwood (1951) England	X		
*Radwan v. Radwan (No. 2)** (1973) England	X		
Re Paine (1940) England		X	
Pugh v. Pugh (1951) England		X	
*Padolecchia v. Padolecchia** (1968) England		X	
*Sottomayor v. De Barros (No. 2)** (1879) England	?	?	
Totals	4	3	

* Cases in the materials

Cheshire & North even the score by adding in on the Dicey & Morris side the *Marriage (Enabling) Act*, 1960. So it is a 4:4 tie.

Putting this silliness aside, what are the issues raised by the dispute? *Cheshire & North* provide the following justification for their theory (11th Ed. pp. 575-578):

B. EVALUATION OF THE TWO THEORIES

Postponing for the moment a consideration of the actual decisions, the question may now be asked—What are the respective merits and demerits of the two rival doctrines?

(i) *The intended matrimonial home doctrine*

On sociological grounds it can be argued that the doctrine of the dual domicil is inferior to that of the intended matrimonial home. Marriage is an institution that closely concerns the public policy and the social morality of the State. In the words of Lord Penzance:

> It confers a status on the parties to it and upon the children that issue from it. Though entered into by individuals it has a public character. It is the basis upon which the framework of civilized society is built; and as such is subject in all countries to general laws which dictate and control its obligations and incidents, independently of the volition of those who enter upon it.

The general laws which dictate its incidents, however, vary not inconsiderably in different countries, and where a woman domiciled in one country marries a man domiciled in another the question naturally arises—Which State is to control the incident of capacity? Which State is in the nature of things entitled to demand pre-eminent consideration for its code of social morality? One clear answer might be—the State in which the parties set up their home.

A rule for the choice of law commands little respect if it is framed without regard to its impact upon the social life of the community that will be most intimately affected by its operation. It seems reasonably clear that whether the intermarriage of two persons should be prohibited for social, religious, eugenic or other like reason is a question that affects the community in which the parties live together as man and wife. Dealing with the case where the wife takes up her residence in the State in which the husband had his pre-marriage domicil, an American commentator has summarized the position in these words:

> It seems almost too clear for argument that the law of that State ought to be applied in determining the capacity to marry, since that State is the only one actually concerned socially with the marital status of the two people involved.

In support of the argument that it is the law there in force which should be allowed to assess the propriety or impropriety of the union one might take the example of the extreme case of an absolute incapacity. If an English girl fifteen and a half years of age, contrary to the law of England, marries a foreigner domiciled in a country whose law permits marriage at this early age, it might be doubted whether it is justifiable to regard the union as void, for the social life of England is unaffected, as the girl proposes to sever her connexion with this country.

As against that, however, it is arguable that rules as to the age of marriage are

designed to protect minors whether they intend to live abroad or not. It is also arguable that a matter so important as capacity to marry should not be determined by the intentions of the parties.

Apart from sociological considerations, principle might seem to support the view that where the parties are domiciled in different countries before their marriage, questions of the essential validity of the union, including their personal capacity, should be governed by the law of the place where they establish their joint home. This is at least compatible with the rule that capacity to enter into a commercial contract is governed by the law of the country with which the transaction has the most substantial connexion. Broadly speaking, domicil signifies the country with which the *propositus* is most closely connected since it is there that he has established his home.

"A connexion" said Lord Brougham many years ago, "formed for cohabitation, for mutual comfort, protection and endearment, appears to be a contract having a most peculiar reference to the contemplated residence of the wedded pair; the home where they are to fulfil their mutual promises, and perform those duties which were the objects of the union; in a word their domicil."

But owing to the peculiar reverence that English law pays to the domicil of origin, it may well happen that the country in which a party is technically domiciled immediately prior to marriage in no sense represents his or her home, whether actual or contemplated.

. . .

When one turns to the disadvantages of the intended matrimonial home theory, then several objections of a practical matter may be advanced against it. It may be objected that any rule is undesirable which renders it impossible to predicate whether a marriage is valid or void at the time of its celebration. Such may be the case if it is doubtful whether the parties genuinely intend to establish their home in the alleged country. Again, it may be asked what is the position if they delay unreasonably in going to the chosen country or never go there at all? Answers to these criticisms have been propounded. First, the question whether a marriage is void for incapacity, unless it arises *incidenter* in the course of some other proceedings, will require the institution of a nullity suit for its answer, by which time it will be known whether the alleged intention of the parties was in fact fulfilled. The difficulty with such an answer is that it ignores the fact that a marriage which is void *ab initio* does not require a decision of a court to determine the parties' status. If it is void, it is void. If the parties have to wait and see what law is to govern their capacity, then their marital status remains in doubt. The second suggested answer is that it is not true that the status of the parties will remain indeterminate, for if the place of their future home is doubtful it is presumed to be in the domicil of the husband at the date of their marriage. However, in that case it is no easy to find merit in a solution which refers the issue of a wife's capacity to marry to the law of the husband's ante-nuptial domicil.

(ii) *The dual domicil theory*

The greatest merit of the dual domicil theory is that it refers capacity to marry

to that law which, up to that time, has governed the status of each party. The *lex domicilii* is the law of the country to which a person "belongs". Furthermore, it preserves equality of the sexes by looking to the law of both parties' domicil. This is of added weight since a wife no longer takes automatically her husband's domicil on marriage.

Varied criticisms have been made of the dual domicil theory. It is said to be inefficacious as a practical working rule, in that it is a rule which admits of its own evasion. Suppose, for instance, that a spinster domiciled in England wishes to marry her uncle who lives and is domiciled in Egypt. English internal law would prohibit the marriage. Being properly advised, however, she travels to Cairo for the marriage ceremony with the intention of remaining there for the rest of her married life, and thus acquires a domicil of choice the law of which permits a marriage between an uncle and a niece. She is now of full capacity in the eyes of English private international law. It is said that the protection supposedly afforded to an English spinster by the dual domicil rule is somewhat illusory. The evasion involved here amounts to as substantial a step as deciding to establish a matrimonial home in Egypt. However, this should not detract from the view, expressed earlier, that if the spinster is under sixteen, she should remain subject to incapacity by English law, so long as it remains the law of her domicil.

Another criticism which might be voiced is that, because of the inflexibility of many of the rules relating to acquisition and loss of a domicil, a person's capacity to marry may be determined by the law of a country he has never visited. Such criticism may provide a reason for changing the rules relating to domicil, rather than those concerning capacity to marry.

Consider these issues as you read the next two judgments which explore some of the issues of the two theories and the problems that can arise.

Sottomayor v. De Barros
(1877), 3 P.D. 1
(Court of Appeal, England)

Nov. 26. The judgment of the Court (James, Baggallay, and Cotton L.J.J.), was delivered by

COTTON L.J.: — This is an appeal from an order of the Court of Divorce, dated the 17th of March, 1877, dismissing a petition presented by Ignacia Sottomayor, praying the Court to declare her marriage with the respondent Gonzalo de Barros to be null and void. The respondent appeared to the petition, but did not file an answer or appear at the hearing; and by direction of the judge the Queen's proctor was served with the petition, and appeared by counsel to argue the case against the petition.

There were several grounds on which the petitioner originally claimed relief, but

the only ground now to be considered is that she and the respondent were under a personal incapacity to contract marriage. The facts are these: The petitioner and respondent are Portuguese subjects, and are and have always been domiciled in that country, where they both now reside. They are first cousins, and it was proved that by the law of Portugal first cousins are incapable of contracting marriage by reason of consanguinity, and that any marriage between parties so related is by the law of Portugal held to be incestuous and therefore null and void; but though not proved, it was admitted before us that such a marriage would be valid if solemnized under the authority of a papal dispensation.

In the year 1858 the petitioner, her father and mother, and her uncle, De Barros, and his family, including the respondent, his eldest son, came to England, and the two families occupied a house jointly in Dorset Square, London. The petitioner's father came to this country for the benefit of his health, and De Barros for the education of his children and to superintend the sale of wine. De Barros subsequently, in 1861, became manager to a firm of wine merchants in London, carrying on business under the style of Caldos Brothers & Co., of which the petitioner's father was made a partner, and which stopped payment in 1865. On the 21st of June, 1866, the petitioner, at that time of the age of fourteen years and a half, and the respondent, of the age of sixteen years, were married at a registrar's office in London. No religious ceremony accompanied or followed the marriage, and although the parties lived together in the same house until the year 1872, they never slept together, and the marriage was never consummated. The petitioner stated that she went through the form of marriage contrary to her own inclination, by the persuasion of her uncle and mother, on the representation that it would be the means of preserving her father's Portuguese property from the consequences of the bankruptcy of the wine business.

Under these circumstances the petitioner, in November, 1874, presented her petition for the object above mentioned, and Sir R. Phillimore, before whom the case was heard, declined to declare the marriage invalid and dismissed the petition, but did so, as we understand, rather because he felt himself bound by the decision in the case of *Simonin v. Mallac*, than because he considered that on principle the marriage ought to be held good. If the parties had been subjects of Her Majesty domiciled in England, the marriage would undoubtedly have been valid. But it is a well-recognised principle of law that the question of personal capacity to enter into any contract is to be decided by the law of domicile. It is, however, urged that this does not apply to the contract of marriage, and that a marriage valid according to the law of the country were it is solemnised is valid everywhere. This, in our opinion, is not a correct statement of the law. The law of a country where a marriage is solemnised must alone decide all questions relating to the validity of the ceremony by which the marriage is alleged to have been constituted; but, as in other contracts, so in that of marriage, personal capacity must depend on the law of domicile; and if the laws of any country prohibit its subjects within certain degrees of consanguinity from contracting marriage, and stamp a marriage between persons within the prohibited degrees as incestuous, this, in our opinion, imposes on the subjects of that country a personal incapacity, which continues to affect them so long as they are domiciled in the country where this law prevails, and renders invalid a marriage between persons both at the time of their marriage subjects of and

domiciled in the country which imposes this restriction, wherever such marriage may have been solemnised. In argument several passages in Story's Conflict of Laws were referred to, in support of the contention that in an English court a marriage between persons who by our law may lawfully intermarry ought not to be declared void, though declared incestuous by the law of the parties' domicile, unless the marriage is one which the general consent of Christendom stamps as incestuous. It is hardly possible to suppose that the law of England, or of any Christian country, would consider as valid a marriage which the general consent of Christendom declared to be incestuous. Probably the true explanation of the passages in Story is given in *Brook v. Brook*, by Lord Cranworth, and by Lord Wensleydale, who express their opinions that he is referring to marriages not prohibited or declared to be incestuous by the municipal law of the country of domicile.

But it is said that the impediment imposed by the law of Portugal can be removed by a Papal dispensation, and, therefore, that it cannot be said there is a personal incapacity of the petitioner and respondent to contract marriage. The evidence is clear that by the law of Portugal the impediment to the marriage between the parties is such that, in the absence of Papal dispensation, the marriage would be by the law of that country void as incestuous. The statutes of the English parliament contain a declaration that no Papal dispensation can sanction a marriage otherwise incestuous; but the law of Portugal does recognize the validity of such a dispensation, and it cannot in our opinion be held that such a dispensation is a matter of form affecting only the sufficiency of the ceremony by which the marriage is effected, or that the law of Portugal, which prohibits and declares incestuous, unless with such a dispensation, a marriage between the petitioner and respondent, does not impose on them a personal incapacity to contract marriage. It is proved that the courts of Portugal, where the petitioner and respondent are domiciled and resident, would hold the marriage void, as solemnized between parties incapable of marrying, and incestuous. How can the courts of this country hold the contrary, and, if appealed to, say the marriage is valid? It was pressed upon us in argument that a decision in favour of the petitioner would lead to many difficulties, if questions should arise as to the validity of a marriage between an English subject and a foreigner, in consequence of prohibitions imposed by the law of the domicile of the latter. Our opinion on this appeal is confined to the case where both the contracting parties are, at the time of their marriage, domiciled in a country the laws of which prohibit their marriage. All persons are legally bound to take notice of the laws of the country where they are domiciled. No country is bound to recognize the laws of a foreign state when they work injustice to its own subjects, and this principle would prevent the judgment in the present case being relied on as an authority for setting aside a marriage between a foreigner and an English subject domiciled in England, on the ground of any personal incapacity not recognised by the law of this country.

The counsel for the petitioner relied on the case of *Brook v. Brook* as a decision in his favour. If, in our opinion, that case had been a decision on the question arising on this petition, we should have thought it sufficient without more to refer to that case as decisive. The judgment in that case, however, only decided that the English Courts must hold invalid a marriage between two English sub-

jects domiciled in this country, who were prohibited from intermarrying by an English statute, even though the marriage was solemnised during a temporary sojourn in a foreign country. It is, therefore, not decisive of the present case; but the reasons given by the Lords who delivered their opinions in that case strongly support the principle on which this judgment is based.

It only remains to consider the case of *Simonin v. Mallac*. The objection to the validity of the marriage in that case, which was solemnised in England, was the want of the consent of parents required by the law of France, but not under the circumstances by that of this country. In our opinion, this consent must be considered a part of the ceremony of marriage, and not a matter affecting the personal capacity of the parties to contract marriage; and the decision in *Simonin v. Mallac* does not, we think, govern the present case. We are of the opinion that the judgment appealed from must be reversed, and a decree made declaring the marriage null and void.

Judgment reversed.

QUESTIONS

1. What purpose is served by the decision in this case? Notice how the domicile of the parties to the marriage would have been determined as a domicile of dependence.

2. What other devices were available to deal with the problem presented by the petition that would not cause the same problems of the case?

3. Does the next case respond adequately to any of these problems?

This statute and all the marriage Acts which have since been enacted are general in their terms, and therefore applicable to, and bind, all persons within the kingdom. In the weighty language of Lord Mansfield, "the law and legislative government of every dominion equally affects all persons and all property within the limits thereof, and is the rule of decision for all questions which arise there:" *Campbell v. Hall.*

Where is the enactment, or what is the principle of English law, which engrafts on this statute the exception that it shall not apply to the marriage in England of cousins german, who by the law of another country were prohibited from marrying without the dispensation of the pope? And, further, I would ask what is the distinction between the prohibition of a marriage, unless the consent of a parent be obtained as in *Simonin v. Mallac*, and the prohibition of a marriage unless the dispensation of the pope be granted, as in this case? And if there be a distinction, which I am unable to perceive, why is greater value to be attached by the tribunals of this country to the permission of the pope than to that of a father?

For the reasons I have given; I hold that the marriage between the petitioner and the respondent was valid, and I dismiss the petition.

NOTES

1. Was the President faithful to the judgment of the Court of Appeal in the earlier case, *Sottomayor v. De Barros* [No. 1]?

2. *Sottomayor v. De Barros (No. 2)* is regarded by *Dicey and Morris* as introducing an awkward and untidy exception to the neatness of the common law rules. These rules are: (11th ed. pp. 622 et seq.)

Rule 71. — Capacity to marry is governed by the law of each party's antenuptial domicile.

(1) Subject to Exceptions 1 and 2 below, a marriage is valid as regards capacity when each of the parties has, according to the law of his or her antenuptial domicile, the capacity to marry the other.

(2) Subject to Exceptions 3, 4 and 5 below, no marriage is valid as regards capacity when either of the parties has not, according to the law of his or her antenuptial domicile, the capacity to marry the other.

Exception 1. — A marriage is not valid if either of the parties, being a descendant of George II, marries in contravention of the Royal Marriages Act 1772.

Exception 2. — A marriage celebrated in England is not valid if either of the parties is, according to English domestic law, under an incapacity to marry the other.

Exception 3. — The validity of a marriage celebrated in England between

persons of whom the one has an English, and the other a foreign, domicile is not affected by any incapacity which, though existing under the law of such foreign domicile, does not exist under the law of England.

COMMENT

From the principle that capacity to marry depends on the law of a person's domicile, it would seem to follow that the incapacity of either party, under the law of his or her domicile, to contract a marriage with the other, invalidates the marriage. However, in the case establishing this doctrine, it was suggested that the application of the principle should be limited, as regards marriages celebrated in England, to cases in which both of the parties are domiciled in a country by the laws of which they are incapable of intermarriage. The suggested limitation has been acted upon, and has been approved by the Court of Appeal, and must be assumed, in spite of its illogical character, to be good law.

The Exception is not confined to cases where the party domiciled in England is the husband, and the way in which it is formulated appears to be the only method whereby the decision in *Sottomayor v. De Barros (No. 2)* can be reconciled with those in *Mette v. Mette* and *Re Paine*. The last two cases indicate that it is generally insufficient for the validity of a marriage that it should be valid as regards capacity by the law of the country where it is celebrated, even if one of the parties is domiciled in such country. The Exception under consideration was, as we have seen, established by a judgment which failed to take account of the distinction (then recently drawn) between questions of form and capacity. Its national bias has led to its being stigmatised as "unworthy of a place in a respectable system of the Conflict of Laws," because of its failure to deal with the converse situation and its consequent preference for the law of the domicile of one of the parties when that happens to coincide with the law of the forum.

Exception 4. — Neither party to a marriage which has been dissolved by a decree of divorce recognised in England under Rule 41 or 42 is precluded from remarrying in the United Kingdom on the ground that the validity of the divorce would not be recognised in any other country.

Exception 5. — A marriage [celebrated in England?] is not invalid on account of any incapacity which, though imposed by the law of the domicile of both or of either of the parties, is penal.

Given the English views of the marriage of a man with his deceased wife's sister, the result in *Brook v. Brook* may be acceptable—even if somewhat bizarre. Notice once again, however, the swamp created by the traditional rules. *Dicey and Morris* has no principle on which to base an analysis. The only reason that can be given for the exception to the rule represented by *Sottomayor v. De Barros (No. 2)* is the need to reconcile that case with *Mette v. Mette* (1859), 1 Sw. & Tr. 416, 164 E.R. 792, and *Re Paine*, [1940] Ch. 46. But compare the position of

the American Restatement (set out, *supra*, p. 88) to the English position. As regards issues of capacity, we can more easily imagine that the rules making marriages invalid are purposeful. The rules regarding consanguinity do represent some moral beliefs or even eugenic principles. But to assume, as does the dual domicile theory, that we have to accept conclusions on these matters without any assessment or even consideration of their impact on our values is an idea about law that is truly "unworthy of a place in a respectable system of the conflict of laws".

Once again, the only approach that can possibly work is to remember that, at base, we are not really fighting about the applicability of rules that might invalidate a marriage in the abstract. We can view the facts of *Sottomayor v. De Barros* simply as a false conflict: this is a relation that we would seek to protect; and Portugal has no reasonable interest in the application of its law, so as to deny, for example, rights of support or succession. If, as in the hypothetical we explored after *Berthiaume v. Dastous*, we have a conflict between two people, both claiming to be one person's spouse, we have a very serious and difficult problem. The problem is difficult precisely because we, let us assume, regard W1's claim as valid, while W2 can reasonably point to her reliance on Portugal's law to protect her claim. As was suggested earlier, these, insofar as they are claims to support, are property claims and must be analyzed as such. As before, and in accordance with § 247 and § 253 of the Restatement, the question will be whether the physical presence of H, the "chattel," in Portugal, and his second marriage there, has an effect on the title (or security interest) of W1 in him.

This analysis on the basis of Currie's interest analysis and the Restatement II is, of course, subject to the said difficulties that we encountered earlier. Within Canada, many problems are avoided by the existence of federal rules (e.g. the *Divorce Act*) and pre-confederation law that is common to most provinces (e.g. the prohibited degrees). Cases like *Agnew v. Gober* (*supra*, p. 105) raise a potentially serious problem, but it is, in part, a constitutional one. Only if we consider that a province can effectively control marriages taking place beyond its borders can any of the really hard cases arise. So far as we know, there have been no such cases. In the international context the possibility of such cases is obvious. It will, however, be more useful to postpone further detailed examination of this issue until we have examined the conflicts problems of divorce. For the issue of competing property claims can easily arise if there are claims by two wives and the claim of the second is based on an argument that an intervening (foreign) divorce is valid with the effect that the claim of the first wife is wiped out. It is not hard to see this as a property problem.

The next five cases are examples of how courts have dealt with some of these problems. As you read them try to decide if they are really very hard cases (and, if so, why) or easy cases in which the difficulties are all created by silly rules.

Chapter 6

Polygamous Marriages

The previous cases have referred to the problem of polygamous or potentially polygamous marriages. The problem arose in the way that so many problems of the common law have. An unconsidered judgment was accepted without question as the law and ever after courts had to find a way around the problem that should never have arisen in the first place. The case that caused the problem was *Hyde v. Hyde* (1866), L.R. 1 P & D 130, a judgment of Lord Penzance. The case was an undefended petition for divorce brought by a man, a Mormon, who had married another Mormon in Utah in 1853. The marriage was in accordance with the Mormon rites, (it was celebrated by Brigham Young) and, in accordance with the Mormon faith, was potentially polygamous in that the man could have married another woman after marrying his first wife. The man later, in 1856, renounced the Mormon faith and returned to England. There was evidence that he would be killed if he returned to Utah. His wife had remarried there in 1859 or 1860. He sought a divorce so that he could marry again. Lord Penzance refused the decree. The grounds of the decision were that the matrimonial law of England was only available to an English type of marriage. He said, "[M]arriage, as understood in Christendom . . . (is) the voluntary union for life of one man and one woman to the exclusion of all others" (p. 133). (Note, the *Matrimonial Causes Act* had been in effect for about 8 years when this statement was made.)

Marriages that were potentially polygamous were, as a result of *Hyde v. Hyde*, refused any kind of matrimonial relief. This ruled out divorce and maintenance. Did this mean that Mr. Hyde, being denied his divorce in England, could remarry without one? An affirmative answer to this question could be given if the first marriage was held to be void. An argument can be made that a person domiciled in Ontario lacks the capacity to contract a potentially polygamous marriage. This was, for example, the focus of the discussion in *Radwan v. Radwan (No. 2)* (*supra*, p. 128). Another method used to protect English women from the fate of being only a second wife was to hold that the first marriage, even though potentially polygamous, had the effect of making any subsequent marriage to a person domiciled in England void: *Baindail v. Baindail*, [1946] P. 122; [1946] 1 All E.R. 342. In other words, the husband did not have the capacity to contract a valid monogamous marriage—at least with an English woman. Further problems arose over rights of succession. The off-spring of a potentially polygamous marriage of an Englishman to an African woman in a tribal ceremony could not succeed as the legitimate child of the Englishman: *Re Bethell* (1888),

38 Ch. D. 220. But see: *Bamgbose v. Daniel*, [1955] A.C. 107; [1954] 3 All E.R. 263.

Canadian courts have had to deal with the same problems. In *Kaur v. Ginder* (1958), 13 D.L.R. (2d) 465, 25 W.W.R. 552 (B.C.S.C.) it was held that a woman domiciled in B.C. could contract a valid polygamous marriage, provided that it was valid in accordance with the *l.l.c.* The marriage was polygamous even though it was monogamous in fact. The issue in that case was the capacity of the woman to marry again. It was held that she could not.

The English courts have had a large number of cases that present the problem raised by a change of domicile. The typical facts are that the marriage takes place in a jurisdiction where polygamy is allowed but is monogamous in fact. The parties subsequently move to England. Has the marriage now become monogamous in fact and in law so that matrimonial relief can be given? The answer is, generally, yes: *Ali v. Ali*, [1968] p. 564; [1966] 1 All E.R. 664. In *Re Hassan and Hassan* (1976), 12 O.R. (2d) 432; 69 D.L.R. (3d) 224, Cory J. held that a woman who was married in a Moslem ceremony in Egypt when she and her husband were domiciled there, could claim under the *Deserted Wives and Children's Maintenance Act*. The marriage became one to which the normal incidents attached after the parties acquired a domicile in Ontario. The judgment contains a full review of the authorities. Cory J. concluded by saying: (pp. 438-439 O.R.; pp. 230, 231 D.L.R.)

> The tragic and inequitable results that follow the application of the principle in *Hyde v. Hyde* have been clearly and forcefully set forth by Mr. Justice Coady and Mr. Justice Lord in the British Columbia cases. The more recent English authorities have recognized that the acquisition of an English domicile of choice, changed the character of a potentially polygamous marriage and gave the English Courts jurisdiction.
>
> The result of the English authorities indicates that in their Court they would consider it had jurisdiction as a result of the husband's change of domicile. In similar circumstances, it would appear to be unnecessary to follow *Hyde v. Hyde* in Ontario. This is particularly true in light of the hardship and suffering that its application would occasion.
>
> It seems quite just and reasonable to expect that one of the factors flowing from the change of domicile and the acquisition of domicile within the Province of Ontario would give rise to a change in the nature of the marriage sufficient to give the Courts in Ontario jurisdiction. As a result of and flowing from the change of domicile and acceptance of jurisdiction, I see no reason why Camelia Hassan should not be considered a "wife" pursuant to the provisions of the *Deserted Wives' and Children's Maintenance Act*, R.S.O. 1970, c. 128. Further, the Provincial Court (Family Division) has jurisdiction to hear an application brought by her for matrimonial relief pursuant to the provisions of that Act.

NOTES

1. The B.C. cases referred to are *Lim v. Lim*, [1948] 2 D.L.R. 353, [1948] 1 W.W.R. 298, and *Sara v. Sara* (1962), 31 D.L.R. (2d) 566).

2. The result of cases like *Re Hassan and Hassan* is that very little may, in practice, be left of *Hyde v. Hyde*.

3. The *Family Law Reform Act, 1978* contained the following provision:

> S. 72. This Act applies to persons whose marriage is actually or potentially polygamous if the marriage was celebrated in a jurisdiction whose system of law recognizes the marriage as valid.

That section has been replaced in the *Family Law Act*, by subsection 1(2) which provides:

> In the definition of "spouse", a reference to marriage includes a marriage that is actually or potentially polygamous, if it was celebrated in a jurisdiction whose system of law recognizes it as valid.

The *Succession Law Reform Act* has an identical provision in subsection 1(2). The *Family Relations Act* of British Columbia has no equivalent provision.

4. There are also problems arising from a change by the man from a monogamous regime to a polygamous regime. One rather exotic example is the case, *A-G of Ceylon v. Reid*, [1965] A.C. 720, [1965] 1 All E.R. 812 (P.C.).

5. The next case is an example of a set of problems that can provide a useful test for our conflicts principles and even our domestic principles. Does the case throw any light on the purposes of the rules regarding consanguinity?

Cheni v. Cheni
[1965] P. 85, [1962] 3 All E.R. 873
(P.D.A. Div., Sir Jocelyn Simon, P.)

Petition for nullity.

On July 8, 1924, the husband and wife, Sephardic Jews domiciled in Egypt, went through a ceremony of marriage in Cairo in accordance with Jewish rites. At the time of their marriage the parties entered into a marriage contract, known as a Katouba, which was witnessed by and filed in the office of the Grand Rabbi of Cairo. That provided for the endowment of the wife by the husband and for other matters. The passage material to the present case runs in the English translation of the French original: "During the lifetime of his wife, [the

PART B

MATRIMONIAL CAUSES

Chapter 7

Introduction

In the common law system, the term "matrimonial cause" refers to any action or suit arising out of the marriage relation. In this course, we shall be focusing principally on divorce and, to a much lesser extent, nullity. There are a number of questions that we shall have to consider in each area; but most of the issues are contained in two pairs of questions. The first pair are:

1. (a) When does a Canadian court have jurisdiction to hear the case?

   (b) When will a Canadian court recognize a judgment of a foreign court dissolving or annulling the marriage?

The second pair are:

2. (a) Is the decree of divorce or annulment effective to confer on the parties the capacity to remarry?

   (b) What effect does the decree have on issues of support and succession?

The first question as regards divorce will not be extensively studied in this course. It is usually covered in courses on Family Law. For our purposes here it is sufficient to notice that the jurisdictional basis for a Canadian is provided by *The Divorce Act*, s. 3. This section is:

> 3.(1) A court in a province has jurisdiction to hear and determine a divorce proceeding if either spouse has been ordinarily resident in the province for at least one year immediately preceding the commencement of the proceeding.
>
> (2) Where divorce proceedings between the same spouses are pending in two courts that would otherwise have jurisdiction under subsection (1) and were commenced on different days and the proceeding that was commenced first is not discontinued within thirty days after it was commenced, the court in which a divorce proceeding was commenced first has exclusive jurisdiction to hear and determine any divorce proceedings then pending between the spouses and the second divorce proceeding shall be deemed to be discontinued.

> (3) Where divorce proceedings between the same spouses are pending in two courts that would otherwise have jurisdiction under subsection (1) and were commenced on the same day and neither proceeding is discontinued within thirty days after it was commenced, the Federal Court - Trial Division has exclusive jurisdiction to hear and determine any divorce proceeding then pending between the spouses and the divorce proceedings in those courts shall be transferred to the Federal Court - Trial Division on the direction of that Court.
>
> 4. A court has jurisdiction to hear and determine a corollary relief proceeding if the court has granted a divorce to either or both former spouses.

It is importance to notice that the jurisdictional basis is restricted. Perhaps because of this—until the latest amendment, the *Divorce Act* jurisdiction differed only slightly from the traditional common law rules—or because they never thought about it, the courts have never developed choice of law rules in divorce. If the Canadian courts have jurisdiction under s. 3 then the issues arising will be sorted out by references to Canadian law. This kind of forum-centred approach may work well in dealing with problems from the point of view of a Canadian court. It causes much more difficulty when the question involves the recognition of a foreign decree.

There is one feature of the *Divorce Act* which requires comment. At common law divorce in the sense of that after it the parties could remarry, was impossible. Divorce was only possible by Act of Parliament. A description of this process—given in the course of sentencing a man on his conviction for bigamy—is the following:

> Prisoner, you have been convicted of the grave crime of bigamy. The evidence is clear that your wife left you and your children to live in adultery with another man, and that you then intermarried with another woman, your wife being still alive. You say that this prosecution is an instrument of extortion on the part of the adulterer. Be it so; yet you had no right to take the law into your own hands. I will tell you what you ought to have done; and, if you say you did not know, I must tell you that the law conclusively presumes that you did. You ought to have instructed your attorney to bring an action against the seducer of your wife for criminal conversation. That would have cost you about a hundred pounds. When you had recovered (though not necessarily actually obtained) substantial damages against him, you should have instructed your proctor to sue in the Ecclesiastical Courts for a divorce *a mensa et thoro*. That would have cost you two hundred or three hundred pounds more. When you had obtained a divorce *a mensa et thoro*, you should have appeared by counsel before the House of Lords in order to obtain a private Act of Parliament for a divorce *a vinculo matrimonii* which would have rendered you free and legally competent to marry the person whom you have taken on yourself to marry with no such sanction. The Bill might possibly have been opposed in all its stages in both Houses of Parliament, and altogether you would have had to spend about a thousand or twelve hundred pounds. You will probably tell me that you never had a thousand farthings of your own in the world; but, prisoner, that makes no

> difference. Sitting here as an English judge, it is my duty to tell you that this is not a country in which there is one law for the rich, and another for the poor. You will be imprisoned for one day, which period has already been exceeded as you have been in custody since the commencement of the Assizes.

Maule J. as reported in Megarry, *Miscellany-at-Law*, 1955, pp. 116-117.

Judicial divorce became possible in England in 1857 with the *Divorce and Matrimonial Causes Act* of that year. That Act had no jurisdictional rules equivalent to s. 5 of the Canadian act. Before 1857 a decree of judicial separation was obtainable before the ecclesiastical courts. This was known as divorce *a mensa et thoro* (as opposed to divorce *a vinculo matrimonii*—which was not divorce as we know it but only a decree of nullity, a decree declaring the marriage to be void). The jurisdictional rules for the ecclesiastical courts were based on the requirement that the respondent be resident in the jurisdiction of the court, usually the diocese. The jurisdictional rules of the ecclesiastical courts were, therefore, similar to the general rules of the common law and focused on the relation of the defendant (or respondent) to the court. The initial development of the jurisdictional rules of the new divorce court were modelled on the ecclesiastical rules and focused on residence of the respondent: *Niboyet v. Niboyet* (1878), 4 P.D. 1. This was changed in the famous case of *Le Mesurier v. Le Mesurier*, [1895] A.C. 517 which held that the court of the domicile was alone competent to dissolve a marriage. Lord Watson said (p. 540):

> [T]he differences of married people should be adjusted in accordance with the laws of the community to which they belong, and dealt with by the tribunal which alone can administer those laws.

At this date the unity of domicile of the husband and wife was well established: the domicile of a wife was for all purposes the same as and changed with that of her husband. The effect of this was that the court of the petitioner's domicile was necessarily that of the respondent's so that it was (in some sense) possible to talk about the existence and identity of the "community" to which both husband and wife might "belong."

The shift from residence to domicile had interesting and perhaps unexpected effects. Since the wife's domicile was necessarily that of her husband, regardless of how functional that might be in practice, a divorce could only be obtained in the domicile of the husband. A woman who was not living with her husband for any reason, her desertion, her justified departure from the matrimonial home, his desertion, had to sue where he was. She was bound to do this even if she did not know where he was! These rules were, as we have seen, rigorously applied in *A.G. Alberta v. Cook* (1926) (*supra*, p. 26). The unfairness of this situation eventually became so obvious that something had to be done. What was done

was to permit a woman to petition for divorce even if she were not domiciled where she petitioned. Thus in the *Divorce Jurisdiction Act*, 1930 (R.S.C. 1952, c. 84) a woman deserted by her husband could petition in the jurisdiction where he had been domiciled at the date of the desertion. It does not require much imagination to see how inadequate this provision was. The law was changed in England by the Act of 1937, *Matrimonial Causes Act*, (1 Edw. 8 and 1 Geo. 6 c. 57), (A. P. Herbert's Act). The Act provided:

> s. 13. Where a wife has been deserted by her husband, or where her husband has been deported from the United Kingdom under any law for the time being in force relating to the deportation of aliens, and the husband was immediately before the desertion or deportation domiciled in England and Wales, the court shall have jurisdiction for the purpose of any proceedings under Part VIII of the Principal Act, notwithstanding that the husband has changed his domicile since the desertion or deportation.

Heavy pressure for reform was brought on the English Parliament after World War II. A large number of Englishwomen had married servicemen from the U.S. and Canada, some even had married Russians. Many left their husbands when they discovered the reality of life outside England and returned home. They could not get divorced in England for they were not domiciled there, nor did they come within the terms of the 1937 Act. The law was, therefore changed once again, *Law Reform (Miscellaneous Provisions) Act, 1949*, and resulted in the *Matrimonial Causes Act*, 1950 (14 Geo. 6 c. 25). That act provided:

> 18.(1) Without prejudice to any jurisdiction exercisable by the court apart from this section, the court shall by virtue of this section have jurisdiction to entertain proceedings by a wife in any of the following cases, notwithstanding that the husband is not domiciled in England, that is to say:
>
> (a) in the case of any proceedings under this Act other than proceedings for presumption of death and dissolution of marriage, if the wife has been deserted by her husband, or the husband has been deported from the United Kingdom under any law for the time being in force relating to the deportation of aliens, and the husband was immediately before the desertion or deportation domiciled in England;
>
> (b) in the case of proceedings for divorce or nullity of marriage, if the wife is resident in England and has been ordinarily resident there for a period of three years immediately preceding the commencement of the proceedings, and the husband is not domiciled in any other part of the United Kingdom or in the Channel Islands or the Isle of Man.
>
> (2) Without prejudice to the jurisdiction of the court to entertain proceedings under section sixteen of this Act in cases where the petitioner is domiciled in England, the court shall by virtue of this section have jurisdiction to entertain any such proceedings brought by a wife, if the wife is resident in

> England and has been ordinarily resident there for a period of three years immediately preceding the commencement of the proceedings.
>
> (3) In any proceedings in which the court has jurisdiction by virtue of this section, the issues shall be determined in accordance with the law which would be applicable thereto if both parties were domiciled in England at the time of the proceedings.

That Act was in turn replaced by the *Matrimonial Causes Act, 1965* and by the *Matrimonial Causes Act, 1973* and finally, by the *Domicile and Matrimonial Proceedings Act, 1973* (c. 45). This last Act abolished the wife's domicile of dependence and established the jurisdictional requirements for an English divorce:

> 5(2) The court shall have jurisdiction to entertain proceedings for divorce or judicial separation if (and only if) either of the parties to the marriage —
>
> (a) is domiciled in England and Wales on the date when the proceedings are begun; or
>
> (b) was habitually resident in England and Wales throughout the period of one year ending with that date.
>
> (3) The court shall have jurisdiction to entertain proceedings for nullity of marriage if (and only if) either of the parties to the marriage —
>
> (a) is domiciled in England and Wales on the date when the proceedings are begun; or
>
> (b) was habitually resident in England and Wales throughout the period of one year ending with that date; or
>
> (c) died before that date and either —
>
> (i) was at death domiciled in England and Wales, or
>
> (ii) had been habitually resident in England and Wales throughout the period of one year ending with the date of death.

The justification for the extensive treatment of the English legislation is that these changes had, as we shall see, an important effect on the rules regarding the recognition of foreign divorce decrees.

The Canadian *Divorce Act* of 1968 provided, as we have seen, for divorce to depend on domicile and residence and that the wife's dependent domicile be abolished for the purposes of that Act. There is, therefore, parallel development in both Canada and England. The legislation differed in one very important

aspect. The Canadian Act required that the petitioner be domiciled in Canada. No account was (or could be) taken of the reasonableness of the assertion of jurisdiction by a Canadian court on the basis of the *respondent's* domicile or residence in Canada. The English Act provides that the domicile of either is sufficient. The new *Divorce Act*, 1985 drops the requirement of domicile entirely and the only requirement is that one spouse be ordinarily resident in the province.

What is very important to notice about both Lord Watson's judgment in *Le Mesurier v. Le Mesurier* and the English and Canadian legislation is that there is an implicit choice of law rule in the jurisdictional rule. Lord Watson referred to the need for the differences of married people to be "adjusted in accordance with the laws of the community to which they belong." Are the Canadian courts justified in applying Canadian law to decide if a divorce should be granted just because the jurisdictional requirements of Canadian law have been satisfied? Does (or should) this issue depend on any other factors such as the reality of domicile or the residence? It is important to notice that the change from jurisdictional rules focusing on the respondent to rules focusing on the petitioner (the residence of either spouse is sufficient) forces us to develop a completely new set of justifications for what we do. We cannot, for example, see the recognition rules as a reflection of our jurisdictional rules nor can we see the interrelation of due process and full faith and credit.

The strength of the ideas behind due process and full faith and credit and the importance to those ideas of the treatment that the respondent has received from the rendering court cannot be ignored. We will examine how the courts have attempted to reconcile the various conflicting pressures that exist whenever a court is asked to recognize a foreign divorce.

One largely unexamined consequence of this change is the possible argument that it is not justifiable to be very concerned about jurisdiction and especially, as we shall see, about recognition, if the Canadian grounds for divorce are so broad. If other words, on what basis do we assert any view that a marriage is a relation that the state wishes to preserve by setting controls upon its dissolution, if we have such generous standards for dissolution?

Chapter 8

Recognition of Foreign Divorce Decrees

The common law rules were changed in 1986 by the present provisions of the *Divorce Act*. Thus s. 22 provides:

> 22.(1) A divorce granted, on or after the coming into force of this Act, pursuant to a law of a country or subdivision of a country other than Canada by a tribunal or other authority having jurisdiction to do so shall be recognized for all purposes of determining the marital status in Canada of any person, if either former spouse was ordinarily resident in that country or subdivision for at least one year immediately preceding the commencement of proceedings for the divorce.
>
> (2) A divorce granted, after July 1, 1968, pursuant to a law of a country or subdivision of a country other than Canada by a tribunal or other authority having jurisdiction to do so, on the basis of the domicile of the wife in that country or subdivision determined as if she were unmarried and, if she was a minor, as if she had attained the age of majority, shall be recognized for all purposes of determining the marital status in Canada of any person.
>
> (3) Nothing in this section abrogates or derogates from any other rule of law respecting the recognition of divorces granted otherwise than under this Act.

We begin our examination of the conflicts problem of divorce by examining what is probably the leading case on the issue of recognition. The question raised is whether the foreign decree is effective to confer on the husband the capacity to re-marry. As you read the case consider how well the House of Lords resolved the basic conflict between the two policies that were mentioned, i.e., the conflict between the policy supporting the sanctity of marriage and the policy of letting people out of a marriage that has "died".

Indyka v. Indyka
[1969] 1 A.C. 33, [1967] 2 All E.R. 689
(H.L., Lords Reid, Morris, Pearce, Wilberforce and Pearson)

> [Rudolph, whose domicile of origin was Czechoslovakia, married Helen in that country in 1938. When the Germans invaded Czechoslovakia he joined the Czech army and later the Polish army. He was captured by the Soviets and imprisoned in Siberia. In 1946 he made his way to England, acquiring a domicile of choice there. During all this period he was unable to communicate with Helen, but he did not desert her. She obtained a Czechoslovakian divorce in 1949.

> must be that experience has shown (and so convinced our own and other legislatures) that it is the wife who requires this mitigation, that the nature of what is required has been clearly shown, and that (with the possible exception of the case where he is respondent to a wife petitioner and desires to cross-petition) no corresponding case has been shown to exist as regards the husband. He retains his domicile and the right to change it. All that this development does is remove an inequitable inequality arising from the anachronistic dependence of the wife for her domicile on her husband.
>
> How far should this relaxation go? In my opinion, it would be in accordance with the developments I have mentioned and with the trend of legislation—mainly our own but also that of other countries with similar social systems—to recognize divorces given to wives by the courts of their residence wherever a real and substantial connection is shown between the petitioner and the country, or territory, exercising jurisdiction. I use these expressions so as to enable the courts, who must decide each case, to consider both the length and the quality of the residence and to take into account such other factors as nationality which may reinforce the connection. Equally they would enable the courts (as they habitually do without difficulty) to reject residence of passage or residence, to use the descriptive expression of the older cases, resorted to by persons who properly should seek relief here for the purpose of obtaining relief which our courts would not give. I draw support in this from the opinion of *Le Mesurier v. Le Mesurier*, where it was said:
>
> > Bona fide residence is an intelligible expression, if, as their Lordships conceive, it means residence which has not been resorted to for the mere purpose of getting a divorce which was not obtainable in the country of domicile.
>
> Applying the principle stated to the facts of this case, without recapitulation, the conclusion easily emerges that the Czechoslovakian divorce of 1949 should be recognized.

NOTES

1. Lords Reid, Morris, Pearce and Pearson wrote separate judgments agreeing in the result. They advanced slightly different formulations for the test to be applied but, as with *Chaplin v. Boys*, (*supra* Vol. I, p. 120) it is Lord Wilberforce's judgment which is most commonly cited. You will recall that in *Morguard*, (*supra* Vol. I, p. 348) the Supreme Court of Canada made use of Lord Wilberforce's judgment in *Indyka*.

2. Once again the need to consider where we are and where we are going arises. The House of Lords sees that there are two competing principles to be reconciled: the need to prevent limping or "unilateral" marriages, and the concern that divorce be genuine. It can be suggested that these principles are irreconcilable.

3. The limitations in the House of Lords' approach can be seen in cases dealing with the question of whether the test advanced in *Indyka* should be applied "retroactively". That question has arisen both in England and, as illustrated in the following case, in Canada.

Edward v. Edward
(1987), 39 D.L.R. (4th) 654 (Sask. C.A.)

[This case arose out of Stephanie Edward's application pursuant to Saskatchewan's *Dependants' Relief Act*, R.S.S. 1978, c. D-25 for a portion the estate of her late husband, Harold. This was opposed by a child of the deceased's first marriage, Shirley Skolrood, who argued that since her father had not properly divorced his *second* wife (the first marriage having ended by the death of the wife) his purported marriage to the applicant was not valid. The applicant could not succeed unless she could show she had been married to the deceased.

[The circumstances of the divorce purporting to terminate the deceased's second marriage were as follows: The wife, who had married Harold Edward in Idaho in 1950, petitioned for and obtained a divorce in California in 1955, having met the residency requirement of that state. She was not, however, domiciled in California. She had gone there with Harold Edward to live, but he had returned to Saskatchewan before she petitioned for divorce.

[At trial Stephanie Edward succeeded in persuading the judge to recognize Harold Edward's divorce (and hence her subsequent marriage to him) by applying *Indyka*. Mrs. Skolrood appealed. BAYDA C.J.S. delivered the judgment of the court. He stated the facts and the reasons for judgment at trial, and continued:]

Mrs. Skolrood appealed the judge's decision. One of her main grounds of attack was that the respondent was not the husband's "wife" within the meaning of the *Dependants' Relief Act* or the *Intestate Succession Act* and was, therefore, totally barred from making a claim under those Acts. That submission was predicated on the assertion that when he married the respondent, the husband was not legally divorced from his second wife.

It was contended that the law, in a Saskatchewan court, for determining the validity of the California divorce, was the law of Saskatchewan as it was perceived in 1957, at the time of the husband's marriage to the respondent wife, and not the law of Saskatchewan as it was found to exist at the time of the trial of this action. In particular, it was contended that the 1957 law of Saskatchewan relating to the husband's domicil for the purpose of a divorce required a finding of non-recognition of the California divorce; and that the "substantial connection" enunciated in the 1967 case of *Indyka v. Indyka*, applied by the judge, did not operate retrospectively to affect the validity, or more accurately the recognition of validity, of the husband's divorce in 1957. I turn now to consider these submissions respecting the retrospective effect of an overruling of a precedent (the first interesting point of law).

> Traditionally in England and in Canada, judicial decisions have been given both retrospective and prospective effect. The law declared by a court decision applies to both future and past transactions. This retrospective application is part of the declaratory theory of law and precedent. Blackstone in his *Commentaries on the Laws of England*, 4th ed; Book I (1771), at pp. 69-70, stated it best: "For if it be found that the former decision is manifestly absurd or unjust, it is declared, not that such a sentence was bad law but that it was not the law."
>
> . . .
>
> It appears the principle has become so elementary that most courts now readily apply it without making reference to it and perhaps without even recognizing that they are using it. A good example of this is the frequent application of the rule in the very case which bears so closely upon the main issue in the present case: *Indyka v. Indyka*.
>
> In that case the House of Lords changed the common law with respect to recognition of foreign divorces. The House of Lords ruled that the courts of England will recognize a foreign divorce decree granted upon the petition of a wife, if, notwithstanding the husband's domicile, a real and substantial connection exists between the petitioner and the jurisdiction where the divorce was granted. This judgment was issued on May 23, 1967, but has been applied by both English and Canadian courts to recognize foreign divorces occurring prior to 1967.
>
> As the foregoing indicates, in my respectful view, the judge was correct to apply the *Indyka* rule to determine whether to recognize the husband's California divorce. Given the facts before her,the judge was also correct to conclude that there existed a "real and substantial connection' within the meaning of *Indyka* between the petitioner (and the husband as well) and the State of California, the jurisdiction where the divorce was granted. There was not dispute about the validity of the wife's marriage in any other respect. In the result the judge made no error in finding that the respondent wife was the "wife" of the deceased husband within the meaning of the *Dependants' Relief Act* and within the *Intestate Succession Act*) and thus a dependant within the meaning of the first Act.

NOTES AND QUESTIONS

1. Following their 1957 marriage Stephanie and Harold Edward had lived together for 27 years until Harold's death in 1984. Towards the end of his life, Harold's health declined considerably, and from 1978 until his death his wife had to bathe him, wash his hair and otherwise attend constantly to his needs. There was, in short, strong pressure on the court to find a valid marriage in order to afford appropriate financial protection to Stephanie Edward. As a practical question you might consider what she would have been entitled to recover on some "unjust enrichment" basis had she not been held to be a spouse.

2. Suppose the marriage had worked out differently. Suppose that one month after their 1957 wedding the parties had sought to put an end to the marriage and that Stephanie attended a lawyer to seek assistance in doing so. The lawyer then told her that she had no need of a divorce since her "husband" had not validly divorced his previous wife. This would have been accurate advice in 1957. Stephanie might then simply have left Harold (no divorce would have been possible and no annulment necessary), and she might have married another man. The question of whom Stephanie was married to might then arise in 1987. Where would the logic of Bayda C.J.S. and his views about retrospectivity leave us then?

The next case raises this issues reliance, "genuine" divorce and limping marriages in a fairly dramatic way. How well does the court resolve the issues or, to state the problem more precisely, how far does the court meet the need to provide a predictively useful rule for determining what foreign divorce will be recognized?

Messina (formerly Smith otherwise Vervaeke) v. Smith (Messina intervening), (Queen's Proctor showing cause)
[1977] P. 322, [1971] 2 All E.R. 1046 (P.D.A.)

Petitions. Marie Therese Rachelle Messina (formerly Smith otherwise Vervaeke) filed a petition on 29th May 1970 praying for a decree of nullity of her marriage to the respondent, William George Smith, on 11th August 1954 at the registry office for the district of Paddington, on the grounds that when she went through the ceremony she was at all times ignorant of the nature of the contract which she had been induced to enter into, and further and/or in the alternative that she was forced to go through the ceremony of marriage. Following the grant of a decree nisi in the suit on the first ground on 23rd June 1970 by his Honour Judge Forrest, Salvatore Messina applied for, and, on 24th November 1970, was granted, leave to intervene in the suit under s. 7(1) of the *Matrimonial Causes Act, 1965* to show cause why the decree should not be made absolute. On 26th October 1970 the Queen's Proctor also intervened to show cause under s. 6 of the 1965 Act. On 30th October 1970 the petitioner obtained leave to file an amended further petition in which she prayed for a decree of nullity on the ground that, at the time of the marriage ceremony, the respondent was married to his former wife, Helen Josephina Gavrilkina, in that a decree of divorce obtained against the respondent by the former wife on 20th June 1946 in the court for the Eighth Judicial District of the State of Nevada in and for the county of Clark sitting at Las Vegas was invalid. Salvatore Messina obtained leave to intervene in the second suit under s. 44 of the *Matrimonial Causes Act, 1965*. The facts are set out in the judgment.

ORMROD, J., read the following judgment. The real issue which lies at the root of this case is whether the petitioner, Mme Messina, is the lawful widow of Eugenio Messina, and therefore entitled under the Italian law of succession to one half of his estate. The petitioner married Eugenio Messina ("Eugenio") in

Smith and Gavrilkina ought to be recognised as a valid dissolution of that marriage. Mr. Smith, therefore, was free to marry the petitioner in this case on 11th August 1954 and that marriage is a valid marriage. The second petition accordingly fails and must be dismissed.

NOTES AND QUESTIONS

1. There were further proceedings in Marie's efforts to obtain a share of Eugenio's estate. In *Vervaeke v. Smith*, [1982] 2 All E.R. 143 (H.L.) Marie's attempt to get the English courts to accept a Belgian decree annulling her marriage to Smith was rejected. The English courts refused to accept the Belgian decree as of any effect. It had been obtained in Belgium after the judgment of the English High Court (and the subsequent abandonment of an appeal) in *Messina v. Smith*.

2. What, precisely, is a "bogus" divorce and what—again being very precise—is wrong with it?

3. It is hard to see how the distinction between *Messina v. Smith* and *Mountbatten v. Mountbatten* can be maintained. Each decree seems as "bogus" as the other. If we seek to resolve the conflict of principle. we have to ask what is the purpose of each or the concern behind each. One possible answer to these questions would go like this. The concern to prevent limping marriages is a concern analogous to that which found expression in *Taczanowska*. It is a concern to recognize the reality (and consequent legal effect) of what the parties did. This pressure to recognize arises from the fact that the event in question, the marriage of *Taczanowska* or the divorce in *Indyka* or *Messina v. Smith*, was an event that the parties relied on as determining some important aspects of their lives. It is a fact that a marriage in *Taczanowska* by bringing two people together creates the likelihood that they will have a common reliance or expectation. The event, the marriage ceremony, necessarily brings the parties together. Divorce on the other hand is seldom a joint effort. The facts of the cases we have looked at are typical: the parties are already apart when one obtains a divorce. The decree, being usually obtained by one (and possibly without the knowledge of the other) is likely to create reliance in one only. It is, of course, possible that it may create reliance in both, but this consequence is not necessary in the sense that joint reliance typically follows a marriage. The issues in *Messina v. Smith* are, therefore analogous to but not the same as those in *Taczanowska*.

4. This way of looking at the problem permits us to raise a number of more specific questions and issues:

(a) The pressure to recognize a divorce that arises from the policy of preventing limping marriages must be triggered by the reliance of

one of the parties on the foreign divorce. Such reliance may take the form of a subsequent marriage or an assumption that the parties' lives can now be lived separately and independently. It is unreasonable to require reliance by both, particularly when a decree of divorce may have had no impact on the vitality of the marriage; the parties had separated and the marriage had "died" long before the actual decree dissolving it.

(b) There may be circumstances where there is a need to protect one party's reliance on the *marriage*, even when the other has obtained a divorce. We will explore later the problems of matrimonial property and the issues of protection raised by it. Here the problems we face may not be just the problem of dividing up property, but of providing for maintenance for the dependant spouse. The mere fact that, for example, an Ontario man goes to Nevada and there obtains a divorce after 6 weeks' residence, does not require an Ontario Court to recognize his reliance on the decree and defeat the wife's reliance on the marriage. We could say that his reliance on the Nevada decree as ending his obligation to support his wife would be unreasonable. By saying this, we make the case easy—unreasonable reliance presents only a very weak case, if any, for protection. But even the reasonable reliance of one spouse on the divorce may not justify defeating the reasonable reliance of the other on the marriage.

(c) Once we admit, as we must, that the law cannot make people love each other and live happily in marriage, we have to be very careful about what precisely are the law's concerns in protecting reliance on a marriage. It is suggested that there is one strong concern and one weaker concern. The strong concern is to protect "the sanctity of marriage". It is not necessary to get involved either in arguments about obligations of support, their purpose and justification or in deep theological discussion about marriage and its importance in society. It is sufficient for our purposes, for now, at least, that there are countervailing pressures in divorce that are not present in marriage in the sense that we see little reason to limit the pressure to recognize all marriages as valid. (The special case of bigamy questioned earlier may present the same problem, *supra*, Vol IIIA, pp. 50, *ff.*)

(d) The existence of these pressures must be admitted in any defended divorce petition coming before a Canadian court and even in some undefended positions. How scrupulous should the court be in

scrutinizing the grounds alleged? What conduct on the part of one spouse is part of the normal hazards of marriage and, therefore, insufficient to support an allegation of cruelty? We can recognize and accept that there may be an area where reasonable people can differ over the standard to be applied. There are, however, cases where we will say to one party that, regardless of that party's desire that the marriage remain, the marriage will be dissolved. Similarly we will have to deny one party as much financial protection as that person may like or want or even need. In this we recognize that no general principle of protecting reliance is absolute: it may have to be subordinated to another.

(e) The objection to certain foreign divorce decrees must therefore, be based on the view that the foreign court resolved the conflict of principle in a way that we find objectionable. What is objectionable about a Nevada divorce decree is the fact that the Nevada court applied Nevada law. Would we care if the Nevada court carefully scrutinized the facts and Canadian law before determining that the petitioning spouse had shown that by Canadian law he or she was entitled to a divorce? It is in this way that the choice of law issues in divorce glossed over in *Le Mesurier* come back to cause trouble.

5. It is not suggested that the analysis either has been adopted by any courts so far or will easily solve any problem of the recognition of foreign divorce decrees. What it does do is to suggest that the problems of reconciling the competing pressures in *Messina v. Smith* must be handled by the same methods that we use to handle all of our conflicts problems. There are no conflicts problems in the traditional sense, only geographically complex cases that raise for a Canadian court difficult problems of balancing competing claims.

6. The questions now arise, "How do we start to think about the problem of divorce?" "Are there any ways that would permit us to develop a principled approach to the determination of the question whether a foreign divorce should be recognized or not?" The parallels between the problems of marriage and divorce can now be seen. In each case, any conflict arises because of the fact that one jurisdiction might prefer W1 while another might prefer W2. The package of family law rules of each jurisdiction might make the preference for one depend on rules regarding marriage or rules regarding divorce. As a practical matter, the problem is intensified to the extent that the abstract question of status determines the issue of support or succession. It is easy as we have seen, to have easy cases and hard cases. The question in any easy case is easily resolved; maybe we can protect the reasonable expectations or reliance of *both*

claimants. (We cannot do much about the problem of the assets available being insufficient; it is universally true that blood cannot be got from stones.) Hard cases remain hard. Here the question will usually be how form-centred a B.C. or Ontario court can justifiably be. About all that can be done is to recognize the inexorable logic of the property analogy. If a husband (or wife for that matter) leaves and gets a foreign divorce in circumstances where reliance on the validity of the decree is reasonable by him (or her) and, perhaps especially by the new spouse, we will often be forced to say to the abandoned spouse, "We are sorry, but we cannot protect your reliance, for even under our own law, it can never be anything other than a relative value." Implicit in s. 22 of the *Divorce Act*, 1985, is the recognition of this position.

7. At this point in our analysis we have developed a common standard for resolving disputes of both marriage and divorce. Our position must be that generally we recognize any event in the parties lives that is a "fait accompli", that is any event that creates reliance on the new state of affairs as effective to make (or unmake) the relation of husband and wife. We really can do little else.

8. The complete failure of traditional doctrine to see the problems of marriage (as in *Berthiaume v. Dastous* or *Brook v. Brook*) as the same as the problem of divorce is its single most serious defect in dealing with the latter problem. The remaining cases are a very brief selection of some of the more interesting ones. The first case is a case of a foreign decree of annulment, but nothing turns on that. What is important is the effect given to the foreign decree by the English court.

> be different times for considering the husband's and the wife's respective capacities. Then again, the alleged incapacity might be a relative not an absolute one, like the former incapacity in English law to contract a valid marriage with a deceased wife's sister; at the time of the marriage to the deceased wife, or at her death, the sister might not even have been born. Finally, take the absolute incapacity (as in English law) of non-age. Suppose the following situation. The propositus is domiciled in a territory where the age of consent to marry is fourteen. At fifteen, while he is still unmarried, his domicil is changed to another territory, where the age of consent is sixteen. At the age of 15½ he goes through a ceremony of marriage. Is it conceivable that we should regard that as a valid marriage on the ground that he became emancipated by the law of his then domicil at the age of fourteen? Of course, the law of the ante-nuptial domicil may itself look to the status at the time of the antecedent divorce (or emancipation). If it does, we, too, should apply it; but as part of the law of the ante-nuptial domicil and not as the personal law immediately after the divorce (or emancipation).
>
> My conclusions, therefore, are as follows: — (i) I have jurisdiction to make a decree of nullity in respect of the marriage of Feb. 1, 1964, because it was celebrated in England. (ii) The husband was at all material times domiciled in Italy. (iii) By the Italian law of his immediate ante-nuptial domicil his marriage to Maria Rosa was still subsisting and had not been dissolved by the Mexican decree of December, 1958. (iv) The husband was on Feb. 1, 1964, by his personal law incapable, by reason that he was partner of a still subsisting marriage, of entering into a fresh marriage in England. (v) Accordingly, the ceremony of Feb. 1, 1964, was incapable of constituting a valid marriage and was null and void. (vi) I so decree.

NOTES

1. Though you would not know it from the judgment, the decision in *Padolecchia* was delivered on 31 July 1967, after the decision in *Indyka*, which was delivered on 23 May 1967. Would the application of *Indyka* have solved anything more satisfactorily?

2. The development of a principle of recognizing *faits accomplis* is, unfortunately, not the whole answer. As with our discussion of bigamy, the pressure to be thoroughly consistent has to be subordinated to the need to recognize the existence of pre-emptive rules that represent other values, however hard it may be to understand these. It is suggested that the principle of recognizing, if we can, that which is a *fait accompli* in the lives of the parties, is both a principled and predictively useful approach. It suggests why the House of Lords decided *Indyka* as it did, and what is wrong with *Messina v. Smith*.

3. Occasionally a divorce may not be an event that is relied on. Thus in *Hornett v. Hornett*, [1971] P. 255, [1971] 1 All E.R. 198 (P.D.A.) a wife obtained a divorce in France in 1924. The husband, who was in England, ignored the divorce and brought back the wife with him to England where they

lived for twelve years before separating again. The husband paid his wife support of £1 a week for over thirty years before seeking to be discharged from the order. At that time the court not only discharged him from the order, but recognized the French divorce. The 1924 divorce would not, under English law, have been recognized at any time before the decision of *Indyka v. Indyka*. To recognize it as retroactively valid could create interesting problems.

4. But a divorce that is not a *fait accompli* in the parties' lives creates no reliance and no pressure to recognize the divorce. Such a divorce creates the same problems as an immigration marriage: what do we do with an event, the importance of which comes from the likelihood (or even near certainty) of reliance, when there is none?

5. Let us return to the problem raised by *Padolecchia v. Padolecchia*. Notice that we are still focusing on the question of marriage in the abstract: Is the marriage valid? Is this marriage dissolved so that the parties can remarry? If we could ever escape from the approach that forces us to concentrate on the question whether Ciro is validly married to one of the women featured in the case, the problems are considerably simplified. There might be no good reason to release Ciro from the obligation to support his first wife. Similarly, there might be a good reason for holding him to be obligated to support his second wife. If we could deal with these questions separately the problem of his status disappears.

6. Apart from this way out of the dilemma, there is something worrisome about an approach that determines by English rules whether an Italian who obtains a Mexican mail order divorce while in Venezuela can later marry a Danish woman, even though the marriage takes place in England. The application of the rules would not be changed if Ciro had married a Venezuelan woman in Venezuela after they had obtained legal advice that such a marriage would be valid in Venezuela. Is it satisfactory for an English court to deny that woman any status as a wife (with the possible consequential denial of any of the incidents of marriage)?

7. It is suggested that the following questions may point up some of the problems, though the answer (or answers) may not be obvious:

(a) What was the purpose of the Italian rule prohibiting divorce? (Divorce is now possible in Italy. A similar problem could arise with Eire (the Republic of Ireland).) What can an Ontario court (given the social and legal context within which it functions) do with such a rule? Can an Ontario court engage in a process of reasoned elaboration of the rule?

(b) What, precisely, is the objection to recognition of the Mexican decree?

(c) Is it objectionable because it applied Mexican grounds? Would it be objectionable if it required, for example, a finding of adultery or cruelty, and that such a finding had been made on credible evidence?

(d) Is it possible to hold that the Mexican decree is effective to confer on Ciro capacity to marry,

(i) in Venezuela?

(ii) a Venezuelan woman?

(iii) any woman other than an Italian woman? or

(iv) any bona fide purchaser for value without notice? We are not being facetious; as we have said before, the issues are, in large part, contract and property focused.

(e) What, precisely, is the English court worried about? Why should it care what happens to any of the parties?

8. The next case is one that brought the Ontario Court of Appeal and the Supreme Court of Canada to the attention of all conflicts scholars.

Schwebel v. Ungar
[1964] 1 O.R. 430, 42 D.L.R. (2d) 622
(Court of Appeal)
and
[1965] S.C.R. 148, 48 D.L.R. (2d) 644

[The judgment of the Ontario Court of Appeal was delivered by]

MacKay J.A.: The defendant appeals from the judgment of [McRuer, C.J.H.C., [1963] 1 O.R. 429, 37 D.L.R. (2d) 467], declaring void the marriage of the plaintiff and defendant entered into at Toronto on April 6, 1957, on the ground that there was on that date a valid subsisting marriage between the defendant and one Joseph Waktor.

There is no real dispute as to the evidence.

The defendant was born in Hungary and on November 13, 1945, she was married to Joseph Waktor in Hungary according to the rules of the Jewish faith and such marriage according to the law of Hungary was a valid marriage.

respondent had the capacity to marry according to the law of the country where she was then domiciled. This does not, however, solve the whole problem because as a general rule, under Ontario law a divorce is not recognized as valid unless it was so recognized under the law of the country where the husband was domiciled at the time when it was obtained, and although the validity of the Jewish divorce was at all times recognized in Israel where the Waktors established a domicile of choice within three weeks of it having been granted, it was never so recognized according to the law of the husband's Hungarian domicile of origin.

The Court of Appeal of Ontario has treated these singular circumstances as constituting an exception to the general rule to which I have just referred. In the course of his reasons for judgment MacKay, J., has thoroughly and accurately summarized and discussed the authorities bearing on this difficult question and it would in my view be superfluous for me to retrace the ground which he has covered so well. I adopt his reasoning in this regard and agree with his conclusion that, for the limited purpose of resolving the difficulty created by the peculiar facts of this case, the governing consideration is the status of the respondent under the law of her domicile at the time of her second marriage and not the means whereby she secured that status.

For all these reasons I would dismiss the appeal with costs.

QUESTIONS, NOTES AND PROBLEMS

1. What would have happened if Waktor had, immediately after arriving in Israel, left for British Columbia and had lived there ever since?

2. What would have happened if Waktor had come to Ontario, after spending some time in Israel, while his "wife" remained in Israel, and had married there? Would that marriage be valid?

3. The full account of the marital problem of Mr. and Mrs. Schwebel is given in *Schwebel v. Schwebel* [1970] 2 O.R. 354, 10 D.L.R. (3d) 742, 2 R.F.L 45. Mr. Schwebel was finally able to get out of his marriage to Mrs. Schwebel.

4. We have examined two of the so-called "escape devices" of traditional conflicts doctrine. There is one more. It is known as the "incidental question". *Schwebel v. Ungar* presents such an issue. The issue in that case can be seen as either a question of the status of the wife, that is her capacity to marry in Ontario, or a question of the validity of the divorce of the wife and Waktor. Both of these questions could arise as conflicts issues on their own. Both have well established methods for resolving the questions. If the issue in this case is whether, at the date of her Ontario marriage, the wife had the capacity to marry, we can refer this issue to the law of her antenuptial domicile. (If we accept the

"dual-domicile" theory.) This domicile is Israel. (Note the possibility of very odd arguments here. The wife's ability to acquire a separate domicile depends on her status. If she is a wife, she must, at common law, be domiciled with her husband, Waktor. But, of course, by Israeli law she is single, so she can acquire her own domicile. Note also that though Ontario for all purposes, and the federal Parliament for divorce jurisdiction and recognition purposes *only*, have abolished the wife's dependant domicile, is this a matter to be governed by Ontario or federal law? In other words, since marriage and divorce are federal heads of power under s. 91, do we now have a federal common law rule regarding the domicile of a wife?) If we ignore any problems of domicile, we then, under our choice of law rule, ask whether under Israeli law she has the capacity to marry. That law recognizes the validity of the rabbinical divorce and so she can marry.

5. An "incidental question" arises because we have, on the analysis we have just gone through, set as the main question the wife's capacity to marry. The incidental question was the effect of the rabbinical divorce. We allow the latter question to be answered by reference to the law that under our choice of law rule governs the main question. The effect of this reasoning is that we subordinate our own conflicts rules for determining the validity of a divorce to the Israeli ones. We justify this on the ground that the divorce issue is only incidental to the principal or main inquiry.

6. Once again the analysis is fundamentally flawed. If we pursue the logic of the rules we can allow the wife to marry in Ontario. But if it were Waktor who came here and if he were unwise enough to obtain a domicile of choice here, and if he married or wanted to marry, we would not investigate the divorce as an incidental question for all our rules both as to capacity to marry and the effect of the foreign divorce would be governed by Ontario law. If we assume that the divorce would not be recognized, we have the logically absurd position that the wife can remarry in Ontario and the husband cannot. Traditional conflicts theory has, once again, tied itself in a knot from which there is no escape save the scrapping of the whole enterprise.

7. An interesting analysis of the theoretical issue and its problems is found in Ehrenzweig, *Private International Law*, 1967 pp. 169 ff. *Schwebel v. Ungar* is discussed in a case note by Lysyk (1965), 43 *Can. Bar Rev.* 374.

8. In *Schwebel v. Ungar* the decree of divorce was not given by a court of the type we expect to grant decrees. It was a rabbinical court which received its power from the parties' religious law. Divorce decrees by such courts are common. See, e.g., *Russ v. Russ* [1964] P. 315, [1962] All E.R. 193, (C.A.), when an Egyptian "Talak" divorce was recognized as effective to dissolve the marriage of an Englishwoman and an Egyptian man. At the date of the divorce, the man was domiciled in Egypt. The rule that is usually accepted as

following from *Russ v. Russ* is that a divorce, even of the traditional unilateral Moslem kind, is to be recognized if it is effective by the law of the husband's domicile to dissolve the marriage. It is therefore, consistent with the view that a man, domiciled in, for example, Saudi Arabia, could marry a woman in Ontario and divorce her by "Talak" whenever he felt like it. The cases where this has occurred have been English and there the courts accepted the logic of the rule. See, e.g. *Qureshi v. Qureshi*, [1972] Fam. 173; [1972] 1 All E.R. 325 and *Har-Shefi v. Har-Shefi*, [1953] P. 161, [1953] 1 All E.R. 783.

9. The rule is, of course, logic run riot. If Ontario is concerned about a Nevada divorce because it may jeopardize Ontario values, how much more should it be concerned about a Talak in Ontario? It is true that the effect of the *Family Law Act* may protect a wife, but notice that if the divorce is valid in the sense that it re-confers the capacity to marry, the first wife may be quickly met by the existence of a second, third, fourth and so on. Each one may be a wife who is entitled to support. This is, we may hope, a far-fetched example, but it illustrates (if further illustrations were necessary) the absurdity of the purposeless rules of traditional conflicts analysis. The abolition of the wife's domicile of dependence may offer an Ontario court a way out of the mess. So long as the wife took the husband's domicile, she too would become domiciled in Saudi Arabia or Iran, and would, therefore, be beyond any concern of Ontario, in spite of the fact that she may never have left it. With the abolition of the unity of the domicile of husband and wife, a way may be found for a court, impressed by the authorities, to avoid the absurdities of the traditional rule. The English had to change the common law by statute: *Recognition of Divorces and Legal Separations Act*, 1971 (U.K. 1971), c. 53). Only divorces in the English courts are effective proceedings in England to dissolve a marriage. Since Nova Scotia retains the old common law concept of the unity of the domicile of the husband and wife, a Nova Scotia court may have more problems than an Ontario court in protecting a Nova Scotia wife.

10. In our examination of the rules regarding the enforcement of a foreign money judgment we saw that it was possible to raise as a defence to an action on the foreign judgment that it had been obtained by fraud or by some other objectionable means. The same problem arises in the context of the recognition of foreign divorces. Once again, here as always, the problem of developing a principled approach arises.

11. It is very important to notice that in all cases the foreign court had (or may for the purposes of the inquiry be assumed to have had) jurisdiction. These cases do not, therefore, raise the same issue as in *Indyka* or *Schwebel v. Ungar*. Would it help if the effect of a divorce decree were only to confer capacity to remarry, and if such a decree had no necessary effects on rights of support or succession? Consider how far the recent legislative proposals in

Ontario or B.C. might transform the divorce issue.

REVIEW PROBLEMS

PROBLEM 1

Michael and Anne were married in Hungary in 1930. They were Jews and, after the war, left Hungary as displaced persons in an attempt to reach Israel. During the journey from Hungary to Israel, they ended up in a refugee camp in Greece. While there, they agreed to be divorced and they obtained a Jewish divorce from the rabbi in the camp. Shortly afterward they separated. Michael eventually arrived in Ontario, via Italy, England and France (but not Israel), in 1950 and has lived there ever since. Anne came eventually to Israel where she settled. She married Louis in Israel in 1952, and he died in 1970.

Michael prospered in Ontario and acquired a large estate. He married Tania in 1960 in Nevada. There were no children. He died in 1975. Michael died intestate, and his estate consisted of land and securities in Ontario. The Public Trustee who is acting for Michael's estate seeks the directions of the court as to what he should do.

The divorce of Michael and Anne in Greece was not valid under Greek law, but would be recognized by Israeli law. Anne was served with notice of the Ontario proceedings and appeared to argue that she is entitled to Michael's estate as his widow. This claim is strongly fought by Tania. Michael's brother Charles, also claims the estate as Michael's next of kin.

You are clerk to the judge before whom this case has been argued. Outline the issues, problems and possible solutions to this dispute.

PROBLEM 2

In 1973, Ahmed, a citizen of Pakistan, was living in England. His fiancee, Benazir, was living in Ontario. They were married by proxy in Pakistan. Ahmed applied to be a permanent resident of Canada and was sponsored by Benazir.

In 1974, Ahmed learned that Benazir had married Karim in 1969 in Pakistan. Ahmed was unhappy to learn that Benazir was not a maiden when he had married her, but was prepared to continue the marriage if she could prove to him that she had divorced Karim. Accordingly, Ahmed wrote a "divorce letter" to Benazir, explaining why he wanted to divorce her and that he would not divorce her if she could prove that she was divorced before she had married him. In the letter, after stating the conditions under which he would not divorce her, Ahmed wrote,

"otherwise, consider this divorce absolute (three times)". Under Pakistani family law, this is a valid notice of talaq (divorce). Ahmed sent a copy of the notice of talaq to the appropriate authorities in Pakistan. Ninety days after receiving the notice, the Pakistani authorities issued a certificate of the dissolution of the marriage.

After the certificate dissolving the marriage between Ahmed and Benazir was issued, Ahmed, who was still in Ontario, married Roxanne, who was in Pakistan, by proxy in Pakistan.

Roxanne then applied to come to Canada as a permanent resident, with Ahmed as her sponsor. The application was not successful as immigration found that Roxanne was not Ahmed's spouse. Ahmed found it necessary to return to Pakistan shortly after the marriage between Roxanne and himself, so the sponsorship application was not pursued at that time.

During the next ten years, Roxanne lived in Pakistan and Ahmed lived in Ontario. Ahmed made frequent trips to Pakistan. Ahmed became a Canadian citizen in 1982. Ahmed and Roxanne now have two children.

In 1983, Roxanne again applied to enter Canada as a permanent resident with Ahmed as her sponsor. The application was refused. The refusal is being appealed.

Outline the arguments to be made by each side.

PROBLEM 3

Vladimir and Tatiana, two Russians living in Moscow, had two friends, Igor and Golda. Igor and Golda were Jews who were anxious to leave the U.S.S.R. To do so, they would have to pay a large amount to the government. The four friends hatched a plot: each couple would divorce and each member would marry a member of the other couple. Thus Vladimir divorced Tatiana and married Golda, and Igor divorced Golda and married Tatiana. Vladimir and Tatiana, as Russians married to Jews, were able to accompany their spouses to Israel or the West and the necessary money could be raised by the four of them.

The four friends arrived in Vienna and immediately re-established their former relations (*viz.*, Vladimir and Tatiana, Igor and Golda) without any formality of any kind. They then went their separate ways. Vladimir and Tatiana came to Ontario in 1975. They had no children. Tatiana died in 1993, intestate. Vladimir claims to be entitled to claim her estate as her husband. His claim is resisted by Tatiana's brother Michael.

What result?

Note: The facts of this last problem are not fanciful. We have been told by a member of the R.C.M.P. that such marital "re-arrangements" were a well-known method of financing Jewish emigration from the U.S.S.R. when such emigration was both difficult and expensive.

PART C

COROLLARY RELIEF AND OTHER MATTERS

Chapter 10

Children: Custody and Adoption

1. Custody: The Common Law

Custody disputes may arise in matrimonial causes—as "corollary relief" under the *Divorce Act*—or in other proceedings in which there is no marriage between the parties. As a matter of fact, custody disputes will most often arise between parties who are or have been married. Issues of maintenance most often arise between people who are or were married, but modern legilsation, as we have seen, does not make the existence of a marriage crucial to a claim for support.

The problem of child custody—which parent gets custody of the children when a marriage or relationship breaks up—is one of the most difficult and troublesome issues the law has to face. The conflicts issues centre on jurisdiction and enforcement, and grow out of the problem of "kidnapping". Choice of law is not a common problem in the child custody area since most jurisdictions with which we come into contact have the same substantive law in this area—*viz.*, that in determining questions of child custody the predominant consideration is the best interests of the child. This view of what the law should be represents a radical change from what it used to be. At common law the father had absolute control of the fate of his legitimate children; the mother of her illegitimate children. What makes custody applications hard to decide is that there is no "default" principle—there is no way of satisfactorily deciding a case where the merits are equally divided between the parents. Since there is now nearly universal—at least among "western" societies—agreement on the proper test to be applied should be, the focus is on which court should make that determination and on controlling other ways by which a determination may be improperly and collaterally attacked.

The most common situation that arises in the conflicts situation is that a court in one jurisdiction, say, England, awards custody to the mother and grants the father rights of access. The father, unhappy with this result but unable to change it in England, unilaterally and without warning takes the child to, say, Nova Scotia. This is a breach of the English court order but not a breach of any order of the Nova Scotia court so neither punishable nor directly controllable there. The father then brings an application for custody before the courts of Nova Scotia, hoping to get a more favourable result there than he received before the English courts.

This raises the question of the jurisdiction of the Nova Scotia courts to decide such a question. The parties may have no connection with that province apart from the presence of the father and the abducted child, but—particularly where the abducting parent is making allegations that the legal custodian is an unfit parent—the Nova Scotia courts' concern for the welfare of the child will make them particularly reluctant to decline jurisdiction. As a consequence the common law bases for taking jurisdiction in child are extremely broad. Courts, based on their roles as delegates of the Crown's power as *parens patriae*, have decided that they have jurisdiction to decide custody cases based on (1) the ordinary residence of the child, (2) the domicile of the child, (3) the presence of the child, or (4) the residence or presence of the person controlling the child. These broad jurisdiction bases—especially the third—provide an obvious incentive to a non-custodial parent to remove the children to a new jurisdiction and re-litigate the issue of custody. The negative consequences of this for children are obvious.

A corollary of this broad jurisdictional base is that courts are reluctant to recognize foreign custody orders. They allow evidence of the foreign order to be submitted, but out of concern for the best interest of the child they do not give it preclusive effect. In *McKee v. McKee*, [1951] A.C. 352 (P.C.) custody had been given to the mother in California. The father abducted the child to Ontario and successfully brought an action for custody there. The Privy Council (Lord Simonds, 364-65) said:

> Once it is conceded that the court of Ontario had jurisdiction to entertain the question of custody and that it need not blindly follow an order made by a foreign court, the consequence cannot be escaped that it must form an independent judgment on the question [*viz.*, what is in the child's best interest]. Comity demands, not [the] enforcement [of a foreign judgment], but its grave consideration.

The resulting incentive for unilateral removal of children is clear. Courts sought to limit abuses of this situation by developing a broad discretionary power to decline jurisdiction, but since potential abducting parents could never be certain in advance when this might be exercised against them, the incentive for unilateral removal of children remained. The dilemma is not an easy one to resolve. In individual cases, where a Canadian court feels some foreign judge has made a particularly bad custody decision which genuinely puts a child at risk, the ability to ignore a foreign custody order, permit re-litigation and set matters right seems necessary and proper. But the knowledge that some courts will act this way provides an incentive for non-custodial parents to abduct children.

2. Custody: Provincial Legislation

(a) The Uniform Act

The matter has been addressed by provincial legislatures, with the general effect of enacting statutory limitations on custody jurisdiction. The Uniform Law Conference of Canada has promulgated the *Uniform Custody Jurisdiction and Enforcement Act*, and that has been adopted by all the common law provinces except Alberta, Manitoba and Nova Scotia. (In Ontario the enacting statute is the *Children's Law Reform Act*, R.S.O. 1990, c. C.12.) The premise of the *Uniform Act* is that, with very limited exceptions, only one jurisdiction should have the capacity to address the merits of any child custody dispute: the jurisdiction of the habitual residence of the child. To make it clear that surreptitious removal of children will not work to the advantage of an abducting parent the *Uniform Act* provides:

> 3(3) The removal or withholding of a child without the consent of the person having custody of the child does not alter the habitual residence of the child unless there has been an acquiescence or undue delay in commencing due process by the person from whom the child is removed or withheld.

The *Uniform Act* provides two other bases on which a Canadian court may take jurisdiction in a child custody dispute. The first, set out in s. 3(1)(b) of the *Act*, is a six-part test, and courts have consistently held that each of the six elements must be present before they can take jurisdiction. The elements are as follows:

(1) the child is physically present in the province,

(2) substantial evidence concerning the child's best interest is available in the province,

(3) no application for custody or access to the child is pending in the jurisdiction of the child's habitual residence,

(4) no extra-provincial order in respect of the child has been recognized in the province,

(5) the child has a real and substantial connection with the province, and

(6) on the balance of convenience it is appropriate for jurisdiction to be exercised.

The second additional basis for jurisdiction appears in s. 4 of the *Uniform Act*. It provides that a court may exercise its jurisdiction if the child is physically present in the province and the court is satisfied that the child would suffer

serious harm if it remained in or was returned to the custody of the person legally entitled to that custody. If interpreted expansively this provision has the potential to re-introduce all of the difficulties of the common law position. Non-custodial parents can unilaterally take children to a new province and persuade that province's court to take jurisdiction on the ground that the child is at risk of serious harm if returned to the parent in the jurisdiction of habitual residence. However Canadian courts have been cognisant of the potential for abuse of the "serious harm" test and have not lightly been persuaded to assume jurisdiction under it.

The *Uniform Act* also addresses the question of enforcement of foreign custody orders. Here is its provision (as it appears in Ontario's *Children's Law Reform Act*). Notice how it both dovetails with the provision on jurisdiction and incorporates other functional enforcement concerns.

> 42(1) Upon application by any person in whose favour an order for the custody of or access to a child has been made by an extra-provincial tribunal, a court shall recognize the order unless the court is satisfied,
>
> (a) that the respondent was not given reasonable notice of the commencement of the proceeding in which the order was made;
>
> (b) that the respondent was not given an opportunity to be heard by the extra-provincial tribunal before the order was made;
>
> (c) that the law of the place in which the order was made did not require the extra-provincial tribunal to have regard for the best interest of the child;
>
> (d) that the order of the extra-provincial tribunal is contrary to public policy in Ontario; or
>
> (e) that in accordance with [the habitual residence and 6-part jurisdictional test] the extra-provincial tribunal would not have jurisdiction if it were a court in Ontario.
>
> (2) An order made by an extra-provincial tribunal that is recognized by a court shall be deemed to be an order of the court an enforceable as such.
>
> (3) A court presented with conflicting orders made by extra-provincial tribunals for the custody of or access to a child that, but for the conflict, would be recognized and enforced by the court under subsection (1) shall recognize and enforce that order that appears to the court to be most in accord with the best interests of the child.
>
> (4) A court that has recognized an extra-provincial order may make such further orders under this Part as the court considers necessary to give effect to the order.

> 43(1) Upon application, a court by order may supersede an extra-provincial order in respect of custody of or access to a child where the court is satisfied that there has been a material change in circumstances that affects or is likely to affect the best interests of the child and,
>
> (a) the child is habitually resident in Ontario at the commencement of the application for the order; or
>
> (b) although the child is not habitually resident in Ontario, the court is satisfied,
>
> (i) that the child is physically present in Ontario at the commencement of the application for the order,
>
> (ii) that the child no longer has a real and substantial connection with the place where the extra-provincial order was made,
>
> (iii) that substantial evidence concerning the best interests of the child is available in Ontario,
>
> (iv) that the child has a real and substantial connection with Ontario, and
>
> (v) that, on the balance of convenience, it is appropriate for jurisdiction to be exercised in Ontario.
>
> (2) A court may decline to exercise its jurisdiction under this section where it is of the opinion that it is more appropriate for jurisdiction to be exercised outside Ontario.

The three provinces which have not yet adopted the *Uniform Act* retain the broad common law bases for custody jurisdiction (subject to the *Hague Convention*, *infra*). However those provinces do have legislation dealing with the enforcement of foreign custody orders. This legislation is based on the *Uniform Reciprocal Enforcement of Custody Orders Act* (a product of the Uniform Law Conference which was superseded by the current *Uniform Act*, *supra*). Nova Scotia's *Reciprocal Enforcement of Custody Orders Act*, R.S.N.S. 1989, c. 387 provides:

> 3. A court, upon application, shall enforce, and may make such orders as it considers necessary to give effect to, a custody order in a reciprocating state.

Nova Scotia is thus obliged to enforce all custody orders from reciprocating states, and those states comprise all Canadian provinces. However this obligation is subject to an exception where a Nova Scotia court is satisfied that a child would suffer serious harm if returned to the person named in the foreign order.

(b) The Hague Convention

The second legislative response to the problem of child abduction is the enactment by all Canadian provinces and both territories of legislation bringing into force the *Hague Convention on the Civil Aspects of International Child Abduction*. (You will recall that the existence of various Hague Conferences on aspects of private international law was mentioned in the Introduction to Volume I. The Custody convention is the product of the Hague Conference which has had the most impact in Canada. In Ontario it is brought into force by s. 47 of the *Children's Law Reform Act*, and in Nova Scotia it appears as the *Child Abduction Act*, S.N.S. 1982, c.4. It will be referred to herein simply as the *Convention*.)

The *Convention* applies between Canada and the twenty-two other ratifying countries, which include the U.S.A., the U.K. and France. Like the *Uniform Act*, the *Convention* uses the connecting factor of the habitual residence of the child, however the *Convention* does not focus directly on the question of jurisdiction. The key to the *Convention* is the fact that it requires courts to order the return of wrongfully removed children to the jurisdiction of their habitual residence. Of course this has obvious consequences for judicial jurisdiction, for a Canadian court ordering the return of a wrongfully removed child to, say, Australia pursuant to the *Convention* will simultaneously decline to entertain a custody application with respect to that child. Nevertheless, as the following provisions show, the key to the *Convention* is neither judicial jurisdiction nor enforcement of foreign orders, but simply the return of wrongfully removed children.

> Art. 3 The removal or the retention of a child is to be considered wrongful where:
>
> (a) it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and
>
> (b) at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been exercised but for the removal or retention.
>
> The rights of custody mentioned in sub-paragraph (a) above, may arise in particular by operation of law or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of that State.
>
> . . .
>
> Art. 12 Where a child has been wrongfully removed or retained in terms of Article 3 and, at the date of the commencement of the proceedings

> before the judicial or administrative authority of the Contracting State where the child is, a period of less than one year has elapsed from the date of the wrongful removal or retention, the authority concerned shall order the return of the child forthwith.

It should be noted that the *Convention* does not require the existence of a formal custody order. Imagine that a parent in another contracting state, say, Germany, simply removes the child from the family home and comes to any Canadian province. Assuming that German law automatically attributes joint custody of children to the parents in default of any court order to the contrary, that removal will be wrongful and an application for return pursuant to the *Convention* should be granted. It should be noted that resort to the *Convention* is not mandatory; unless an application for return of a wrongfully removed child is formally brought the *Convention* will not operate.

The *Convention* provides limited grounds for refusal to return a wrongfully removed child. The most important of these parallels that in s. 4 of the *Uniform Act*, *supra*. A court can decline to order the return of a wrongfully removed child where "there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation" (Art. 13(b)). To date this provision has been interpreted narrowly and no Canadian court has yet declined an application pursuant to the *Convention* to order the return of a wrongfully removed child.

3. CUSTODY: *DIVORCE ACT*

Where applications for child custody are brought in connection with divorce petitions judicial jurisdiction is determined in accordance with the general jurisdiction provision in s. 3 of the *Divorce Act* (*supra*, p. 159). Since this power to deal with corollary relief pursuant to divorce is *intra vires* the federal Parliament under s. 91(26) of the *Constitution Act, 1867* (*Zacks v. Zacks*, [1973] S.C.R. 891, 35 D.L.R. (3d) 420) the doctrine of paramountcy dictates that it displaces provincial legislation based on the *Uniform Act*. In other words, courts may have custody jurisdiction under the *Divorce Act* even when the habitual residence test in the *Uniform Act* is not met.

The *Divorce Act* also has a provision dealing with jurisdiction to vary custody orders:

> 5(1) A court in a province has jurisdiction to hear and determine a variation proceeding if
>
> (a) either former spouse is ordinarily resident in the province

at the commencement of the proceeding; or

(b) both former spouses accept the jurisdiction of the court.

Because ss. 3 and 5 of the *Divorce Act* might work to permit custody proceedings to be brought in provinces with which the children have little connection, s. 6 permits applications to be brought to transfer divorce and custody proceedings to provinces with which the children are more substantially connected.

4. ADOPTION

In the years following World War II there was a growth in intercountry adoption, but the problem has not yet been dealt with by Canadian law in a systematic or helpful way. Perhaps because the practice touches both federal jurisdiction over immigration and the provincial power over property and civil rights there has been no Canadian legislation which addresses the many practical problems and abuses which have arisen with respect to transnational adoption. At the meeting of the Hague Conference on Private International Law in May, 1993 the member countries (including Canada) approved a new treaty entitled *Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption*. The goal of this proposed treaty is to establish safeguards to ensure that intercountry adoptions take place in the best interests of the children involved. In August, 1993 the Uniform Law Conference of Canada produced model legislation based on that Convention and presented it to the provinces for implementation. We will not study that Convention here, but you should be aware that over the next few years the provinces are likely to adopt uniform legislation dealing with intercountry adoption, and that many other countries will do the same. The following case gives a sample of the sort of conceptual problems which have plagued courts dealing with this matter.

S. (S.M.) v. A. (J.)
(1992), 89 D.L.R. (4th) 204, 64 B.C.L.R. (2d) 344
(B.C.C.A., Locke, Gibbs and Hinds JJ.A.)

The judgment of the court was delivered by

GIBBS J.A.: This appeal concerns the fate of baby girl, R.A., now two and one-half years old. Since September 15, 1989, when baby R.A. was three months old, she has resided in British Columbia with John Doe and Jane Doe, prospective adoptive parents. Baby R.A.'s mother, J.A., is an American citizen resident in California.

On January 5, 1990, following petition proceedings argued on December 14 and

Chapter 11

Maintenance Orders

Maintenance orders may either be made as corollary relief under the *Divorce Act*, ss. 15 and 16, or under provincial statutes such as Ontario's *Family Law Act* or Nova Scotia's *Family Maintenance Act*. The conflicts problems centre on the enforcement of foreign maintenance orders. This is an important and complex area of the law. It is important because a large amount of money may be payable under maintenance orders, and for many people prompt and full payment may mean the difference between some degree of personal financial solvency and having to seek welfare. Of all legal obligations, maintenance orders are the most commonly ignored or evaded. Many men—and it is generally men who are the subject of such orders—simply do not pay, or do not pay on time. The problems of securing prompt payment even within a single jurisdiction are often formidable. When the persons with maintenance obligations seek to evade them by crossing provincial or international boundaries those problems are multiplied. Apart from the obvious problem of locating defaulting payors, additional difficulties flow from the fact that maintenance orders usually provide for periodic as opposed to lump sum awards. You may have noticed a considerable amount of public attention in recent months to the problem of making maintenance awards more effective. These methods are characterized by the increasing use of public enforcement methods: the use of compulsory deduction from wages or salary, the use of the information of, for example, the records of the Department of National Revenue to find delinquent obligors and the use of publicly supported efforts to assist the dependant family members. We have not yet seen any figures that would indicate the extent of the success that these methods have had.

The Common Law Background

All the common law rules regarding the enforcement of foreign judgments apply to maintenance orders. Before the Supreme Court's decision in *Morguard*, this fact meant the defendant must have been personally served in the jurisdiction of the foreign court or must have submitted to the jurisdiction. Presumably the relaxation of those jurisdictional hurdles in *Morguard* will apply to maintenance obligations in the same way it applied to the commercial judgment which was the subject of that case. The greater difficulty with enforcement of foreign maintenance obligations comes from another feature of the common law enforcement rules: only a "final" judgment of a foreign court can be enforced. Since periodic maintenance payments can generally be varied as the parties' circumstances change, such orders do not qualify as final. This requirement

generally means that an action can only be brought in respect of the arrears under a foreign maintenance order. (See *Burpee v. Burpee*, [1929] 3 D.L.R. 18 (B.C.S.C.).) If the foreign court has the power to vary the arrears in addition to the power to vary future payment obligations, an action cannot even be brought on the arrears: *Maguire v. Maguire* (1921), 50 O.L.R. 100, aff'd 64 D.L.R. 180. The existence of a power to vary (or forgive or suspend) the arrears is desirable, and judges have asserted a power as regards Ontario maintenance orders: see *Condon v. Condon*, [1973] 1 O.R. 132.

> S. 37 of the *Family Law Act* provides:
>
> 37.(1) A dependant or respondent named in an order made or confirmed under this Part, or an agency referred to in subsection 33(3), may apply to the court for variation of the order.
>
> (2) If the court is satisfied that there has been a material change in the dependant's or respondent's circumstances or that evidence not available on the previous hearing has become available, the court may discharge, vary or suspend a term of the order, prospectively or retroactively, relieve the respondent from the payment of part or all of the arrears or any interest due on them and make any other order under section 34 that the court considers appropriate in the circumstances referred to in section 33.
>
> (3) No application for variation shall be made within six months after the making of the order for support or the disposition of another application for variation in respect of the same order, except by leave of the court.

Any order, therefore, under Part III of the FLA is, at common law, unenforceable outside Ontario.

As we have seen, the basis for enforcement of judgments *in personam* is the connection between the defendant and the court. In divorce, however, the court's basis for taking jurisdiction is the connection between the *petitioner* and the court. This inconsistency is guaranteed to cause enforcement problems (as opposed to recognition problems). A "Grade A" divorce for recognition purposes (domicile of the petitioner) can very easily be combined with a completely unenforceable order for maintenance.[1] The logic of the common law position was recognized

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[1] We can ignore, as being of little more than historical interest, those divorce actions in which the husband sought damages against his wife's seducer: see, e.g. *Phillips v. Batho*, [1913] 3 K.B. 25, where an English Court enforced a judgment for damages made by an Indian court against a co-respondent in divorce proceedings. The co-respondent had not been served in India and did not submit to the jurisdiction of the Indian court. *Dicey & Morris* regard the decision as wrong (p. 356). The whole notion of

in *Re Ducharme v. Ducharme*, [1963] 2 O.R. 204, 39 D.L.R. (2d) 1 (C.A.) and *Re Needham v. Needham*, [1964] 1 P.R. 645, 43 D.L.R. (2d) 405 (H.C.) but see, *Summers v. Summers*, [1958] O.W.N. 73, 13 D.L.R. (2d) 454. If the respondent in divorce proceedings submits to the jurisdiction of the foreign court an order for maintenance may be enforceable: *Gwyne v. Mellen* (1978), 90 D.L.R. (3d) 195, affirmed, (1979), 101 D.L.R. (3d) 608 (B.C.C.A.).

Reciprocal Enforcement Legislation

We have seen that the common law rules for the enforcement of maintenance orders put very serious obstacles in the way of a person who would seek to enforce in one province a maintenance order obtained in another. Apart from the problems of the order's not being final, there were the usual problems of the need for personal service on the respondent. A maintenance order given as part of the corollary relief under a divorce decree obtained by a woman resident in one province may be unenforceable at common law if her husband was not personally served in the province where the divorce was obtained. (Such a result if, of course, subject to the fact that since 1968 there has been a federal *Divorce Act*. The problem would arise in any proceedings to enforce the provisions for maintenance outside Canada.) The problem arose in its pure common law form in regard to any order for maintenance given under a provincial statute like the precursors of the *Family Relations Act*. See, e.g., *A.G. Ontario v. Scott*, [1956] S.C.R. 137, 1 D.L.R. (2d) 433, and the *Deserted Wives and Children's Maintenance Act*, R.S.O. 1970, c. 128.

The solution to the problem of the interprovincial and international enforcement of maintenance orders has been the enactment of statutes modelled on the original proposal of the Commissioners for Uniformity of Legislation in Canada, (now the Uniform Law Conference of Canada). The acts of all the common law provinces of Canada are based on this original proposal, though the provisions of the acts are no longer uniform. The absence of uniformity can cause serious problems. The most recent draft of the Uniform Law Conference is that of 1979 (*Proceedings*, 1979, p. 216) and these have been incorporated into the Ontario

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damages for seduction or criminal conversation is so bizarre and grotesque that we can make no sense of any rule based upon such a formation. Section 69 of the former *Family Law Reform Act* abolishes all such actions. Section 69 survived the general repeal of the *Family Law Reform Act*, and became part of the *Dower and Miscellaneous Abolition Act*. That act has been omitted from the R.S.O. 1990 consolidation.

Act, *Reciprocal Enforcement of Support Orders Act*,[2] R.S.O. 1990, c. R.7.

The general purpose of the legislation is to avoid the twin problems of a maintenance order's not being final, and the lack of common law jurisdiction over the "respondent"—the person against whom the order has been made. The legislation recognizes that the most important aspect of a maintenance order is that it provides for periodic payments. A dependant who has to wait for arrears to build up to support an action at common law on them, will be reduced to penury or welfare long before the courts could make an effective order under the common law rules. (As has been mentioned, the power given to a judge to reduce even the amount that is in arrears, means that not even the arrears are collectible by an action on the foreign judgment.)

The operation of the *REMO* acts is, therefore, characterized by speedy methods for enforcement and a concern to get the dependant person the periodic payments that are needed. It should not be thought that the acts always achieve these goals: the law is no more able than creditors to get blood from stones; and the bloody-minded debtor can still—subject to what the new proposals (mentioned, *supra*, p. 275) may do—snap his (or her) fingers at the law. Unlike the usual situation of defaulting debtors, however, the person who ignores an order to pay maintenance may end up in gaol, and the general experience of courts that have tried this method of enforcement is that it is remarkably effective and causes a quick realization that there are worse fates than the payment of money to someone with whom one has had a bitter feud for several years, and to whom one has promised to "be damned before a penny will be paid".

The general scheme[3] of the *REMO* acts is as follows:

1. Proceedings commencing in a Province

(a) If the respondent can be personally served in the province, the court makes an order for maintenance in the ordinary course. If the respondent appears, he or she may give evidence and any order made will be a "final

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[2]We shall generally use the term, *"REMO"* to refer to the legislative scheme for the enforcement of support orders. Most of the existing literature and most provincial legislation are based on *REMO* as opposed to *RESO* legislation.

[3] The new Ontario legislation, the *Reciprocal Enforcement of Support Orders Act*, differs in several significant ways from the earlier *REMO* legislation. That legislation was nearly uniform across Canada. Any lack of uniformity can create serious problems for people seeking support.

order". A final order can only be made after personal service. If the respondent subsequently leaves the province, the final order may be registered in any reciprocating jurisdiction to which he or she goes, and when registered the order may be enforced in that province. (The earlier drafts of the *REMO* acts provided that the court in which the final order was registered could only "enforce" the order, and it was generally, but not universally recognized that a power to "enforce" did not include a power to vary or rescind.)

(b) If the respondent cannot be personally served in the jurisdiction in which the dependant makes an application for an order (usually the place where she or he lives) then the court before which the dependant appears cannot make a final order but must instead make a "provisional order". Such an order is stated to be of no effect until it has been "confirmed". The new Ontario legislation does not provide for this "suspensive" effect. As a matter of fact, since the respondent is not in Ontario, any order will not be enforceable until proceedings are taken in the other jurisdiction. The provisional order will be confirmed by the court that has personal jurisdiction over the respondent. The court making the provisional order sends the order, together with a statement of the evidence and the grounds upon which the respondent could have opposed the making of any order, to the Attorney General who transmits it to the Attorney General in the reciprocating jurisdiction where the respondent is and that person sends it to a court in that jurisdiction for enforcement after the respondent has been personally served and required to show cause why the order should not be confirmed. Subject to an issue of the choice of law (to be discussed shortly), the confirmed order becomes an order of the confirming court and proceedings for its enforcement may be brought there. If further evidence is required before confirmation, or upon any application to vary or rescind brought by the respondent, the confirming court can send the request to the court that made the provisional order, which will obtain the evidence from the applicant for the original order.

2. Proceedings commencing outside the province in a reciprocating state:

(a) As indicated above, when a respondent was personally served in a reciprocating state, the order made against him or her is a "final order". A final order comes for registration, and upon registration may be enforced as a judgment or order made in the state of registration. As the phrase "final order" implies, such an order has more extraterritorial effect than a "provisional order", and is binding without the need for confirmation. The power of the Ontario court to vary or rescind a final order, coupled with the power to request that the rendering court provide

more evidence before any change is made, avoids some Ontario problems, but if that power is not acknowledged by the rendering court (which may continue to regard its order as final), there will be a break-down in the scheme of co-operation envisaged by the *REMO* acts, and some unfortunate dependant or respondent will possibly be quite unfairly treated.

(b) If the respondent was not personally served in the rendering state, a provisional order will have been made. That order comes for confirmation, and before confirmation there will be a hearing to determine if the order should be confirmed, and if so in what amount. Once the order has been confirmed, it will become an order of the confirming court and enforceable as such. As mentioned earlier, there is a choice of law clause operating on confirmation. The Canadian statutes provide that the respondent may only raise those defences that could have been raised in the original jurisdiction where the provisional order was made, in other words, where the claimant began the proceedings. The reason for such a provision is unclear. It might have been thought that the respondent should not be able to change the nature of the obligations on him or her by a timely move from one jurisdiction to another, and in such a case it might have made sense to apply the law of the place where the obligations might have been regarded as arising. But the assumption that it is only the respondent who will move is invalid. To apply the law of the place where the dependant goes to when she or he leaves the other, could be regarded as unfair.

Some support for this argument is provided by the fact that the provisional order procedure cannot operate in theory (though it does in practice) between Canada and the United States. The American rule, based on the Fourteenth Amendment, is that the law of the place where the respondent is must govern the extent of the obligations imposed upon him or her. An American court does not send a "provisional order", but a "Request for an Order". Administratively, the American and Canadian initiating orders are made compatible by the American order's being re-titled "Provisional Order" and processed as one. There are no arrangements whereby a Canadian court can get more evidence from an American court on the substantive obligations as being set by the place where the order goes for "confirmation". A *Charter* argument seems to be quite likely in this country before long. *De Savoye v. Morguard Investments Ltd.* would seem to make that result more likely. The fact that the substantive obligations of support on the respondent are very similar in all Canadian jurisdictions may mean that the problem simply will not arise. It has so far arisen where there have been different rules for the age at which children lose the right to be supported by a parent. If the provincial law differs as regards the obligation of one "spouse" to

support the other, then we may expect more difficult and frequent problems.

The *REMO* procedure, unlike the *REJA* procedure is a very significant change in the common law. Most provinces reciprocate with a very wide range of jurisdictions around the world. The international aspects of this problem are immensely complex, see, Cavers "International Enforcement of Family Support" (1981), 81 *Col. L. Rev.* 994. The whole area of maintenance is very important and the legislation requires very careful consideration.

The *Divorce Act* adopts the *REMO* procedure for dealing with the problem of variation and rescission. These provisions are found in ss. 17, 18 and 19 of the Act:

> 17.(1) A court of competent jurisdiction may make an order varying, rescinding or suspending, prospectively or retroactively,
>
> (a) a support order or any provision thereof on application by either or both former spouses; or
>
> (b) a custody order or any provision thereof on application by either or both former spouses or by any other person.
>
> (2) A person, other than a former spouse, may not make an application under paragraph (1)(b) without leave of the court.
>
> (3) The court may include in a variation order any provision that under this Act could have been included in the order in respect of which the variation order is sought.
>
> (4) Before the court makes a variation order in respect of a support order, the court shall satisfy itself that there has ben a change in the condition, means, needs or other circumstances of either former spouse or of any child of the marriage for whom support is or was sought occurring since the making of the support order or the last variation order made in respect of that order, as the case may be, and, in making the variation order, the court shall take into consideration that change.
>
> (5) Before the court makes a variation order in respect of a custody order, the court shall satisfy itself that there has been a change in the condition, means, needs or other circumstances of the child of the marriage occurring since the making of the custody order or the last variation order made in respect of that order, as the case may be, and, in making the variation order, the court shall take into consideration only the best interests of the child as determined by reference to that change.
>
> (6) In making a variation order, the court shall not take into consideration any conduct that under this Act could not have been considered in making the order in respect of which the variation order is sought.

(7) A variation order varying a support order that provides for the support of a former spouse should

(a) recognize any economic advantages or disadvantages to the former spouses arising from the marriage or its breakdown;

(b) apportion between the former spouses any financial consequences arising from the care of any child of the marriage over and above the obligation apportioned between the former spouses pursuant to subsection (8);

(c) relieve any economic hardship of the former spouses arising from the breakdown of the marriage; and

(d) in so far as practicable, promote the economic self-sufficiency of each former spouse within a reasonable period of time.

(8) A variation order varying a support order that provides for the support of a child of the marriage should

(a) recognize that the former spouses have a joint financial obligation to maintain the child; and

(b) apportion that obligation between the former spouses according to their relative abilities to contribute to the performance of the obligation.

(9) In making a variation order varying a custody order, the court shall give effect to the principle that a child of the marriage should have as much contact with each former spouse as is consistent with the best interests of the child and, for that purpose, where the variation order would grant custody of the child to a person who does not currently have custody, the court shall take into consideration the willingness of that person to facilitate such contact.

(10) Notwithstanding subsection (1), where a support order provides for support for a definite period or until the happening of a specified event, a court may not, on an application instituted after the expiration of that period or the happening of that event, make a variation order for the purpose of resuming that support unless the court is satisfied that

(a) a variation order is necessary to relieve economic hardship arising from a change described in subsection (4) that is related to the marriage; and

(b) the changed circumstances, had they existed at the time of the making of the support order or the last variation order made in respect of that order, as the case may be, would likely have resulted in a different order.

(11) Where a court makes a variation order in respect of a support order or a custody order made by another court, it shall send a copy of the variation order, certified by a judge or officer of the court, to that other court.

18.(1) In this section and section 19,

"Attorney General", in respect of a province, means

(a) for the Yukon Territory, the member of the Council of the Yukon Territory designated by the Commissioner of the Yukon Territory,

(b) for the Northwest Territories, the member of the Council of the Territories designated by the Commissioner of the Northwest Territories, and

(c) for the other provinces, the Attorney General of the province,

and includes any person authorized in writing by the member or Attorney General to act for the member or Attorney General in the performance of a function under this section or section 19;

"provisional order" means an order made pursuant to subsection (2).

(2) Notwithstanding subsection 17(1), where an application is made to a court in a province for a variation order in respect of a support order and

(a) the respondent in the application is ordinarily resident in another province, and

(b) in the circumstances of the case, the court is satisfied that the issues can be adequately determined by proceeding under this section and section 19.

the court may make a variation order without notice to and in the absence of the respondent, but such order is provisional only and has no legal effect until it is confirmed in a proceeding under section 19 and where so confirmed it has legal effect in accordance with the terms of the order confirming it.

(3) Where a court in a province makes a provisional order, it shall send to the Attorney General for the province

(a) three copies of the provisional order certified by a judge or officer of the court;

(b) a certified or sworn document setting out or summarizing the evidence given to the court; and

(c) a statement giving any available information respecting the identification, location, income and assets of the respondent.

(4) On receipt of the documents referred to in subsection (3), the Attorney General shall send the documents to the Attorney General for the province in which the respondent is ordinarily resident.

(5) Where, during a proceeding under section 19, a court in a province

remits the matter back for further evidence to the court that made the provisional order, the court that made the order shall, after giving notice to the applicant, receive further evidence.

(6) Where evidence is received under subsection (5), the court that received the evidence shall forward to the court that remitted the matter back a certified or sworn document setting out or summarizing the evidence, together with such recommendations as the court that received the evidence considers appropriate.

19.(1) On receipt of any documents sent pursuant to subsection 18(4), the Attorney General for the province in which the respondent is ordinarily resident shall send the documents to a court in the province.

(2) Subject to subsection (3), where documents have been sent to a court pursuant to subsection (1), the court shall serve on the respondent a copy of the documents and on the respondent and the applicant a notice of a hearing respecting confirmation of the provisional order and shall proceed with the hearing, taking into consideration the certified or sworn document setting out or summarizing the evidence given to the court that made the provisional order.

(3) Where documents have been sent to a court pursuant to subsection (1) and the respondent apparently is outside the province and is not likely to return, the court shall send the documents to the Attorney General for that province, together with any available information respecting the location and circumstances of the respondent.

(4) On receipt of any documents and information sent pursuant to subsection (3), the Attorney General shall send the documents and information to the Attorney General for the province of the court that made the provisional order.

(5) In a proceeding under this section, the respondent may raise any matter that might have been raised before the court that made the provisional order.

(6) Where, in a proceeding under this section, the respondent satisfies the court that for the purpose of taking further evidence or for any other purpose it is necessary to remit the matter back to the court that made the provisional order, the court may so remit the matter and adjourn the proceeding for that purpose.

(7) At the conclusion of a proceeding under this section, the court may make an order

(a) confirming the provisional order without variation;

(b) confirming the provisional order with variation; or

(c) refusing confirmation of the provisional order.

(8) The court, before making an order confirming the provisional order with variation or an order refusing confirmation of the provisional order, shall

decide whether to remit the matter back for further evidence to the court that made the provisional order.

(9) Where a court remits a matter pursuant to this section, the court may make an interim order requiring the respondent to secure or pay, or to secure and pay, such lump sum or periodic sums, as the court thinks reasonable for the support of

(a) the applicant,

(b) any or all children of the marriage, or

(c) the applicant and any or all children of the marriage,

pending the making of an order under subsection (7).

(10) The court may make an order under subsection (9) for a definite or indefinite period or until the happening of a specified event and may impose such other terms, conditions or restrictions in connection therewith as it thinks fit and just.

(11) Subsections 17(4) and (6) to (8) apply, with such modification as the circumstances require, in respect of an order made under subsection (9) as if it were a variation order referred to in those subsections.

(12) On making an order under subsection (7), the court in a province shall

(a) send a copy of the order, certified by a judge or officer of the court, to the Attorney General for that province, to the court that made the provisional order and, where that court is not the court that made the support order in respect of which the provisional order was made, to the court that made the support order;

(b) where an order is made confirming the provisional order with or without variation, file the order in the court; and

(c) where an order is made confirming the provisional order with variation or refusing confirmation of the provisional order, give written reasons to the Attorney General for that province and to the court that made the provisional order.

The definition of "competent court" in s. 17 is defined in subsection 5(1):

A court in a province has jurisdiction to hear and determine a variation proceeding if

(a) either former spouse is ordinarily resident in the province at the commencement of the proceeding; or

(b) both former spouses accept the jurisdiction of the court.

Chapter 12

Matrimonial Property

It has long been recognized that the state has an interest in promoting the stability of the family unit and protecting social morality through the regulation of marriage. The relatively recent increase in the frequency of divorce and separation has resulted in a change of legislative focus, from an emphasis on the regulation of parties entering into marriage, to a need to provide some measure of protection to the economically-disadvantaged spouse upon marital breakdown. This protection has not always been adequate, but the state certainly has an interest in preventing such spouses from becoming a burden on the community.

Until recently, the fulfilment of that interest was limited to the powers of courts to award maintenance to an economically weak spouse (usually the wife) under federal divorce legislation. The courts had no discretion to allocate property otherwise than in accordance with title: a farm wife's labour was no substitute for a hard cash contribution. (See *Murdoch v. Murdoch*, [1975] 1 S.C.R. 423 and *Peter v. Beblow* (1993), 101 D.L.R. (4th) 621 (S.C.C.).) The rare exception was the application by the courts of the doctrines of constructive and resulting trusts. In the last twenty years, all the provinces have taken statutory initiatives to alleviate the problem and provide for a more equitable division of property on marital breakdown. We will examine the effects of this legislation shortly. First it is necessary to examine the traditional, judge-made choice of law rules dealing with matrimonial property.

The Traditional Choice of Law Rules

Anglo-Canadian choice of law rules for matrimonial property disputes have reflected a tension between alternative characterizations of the issue. Sometimes such disputes are resolved by choice of law rules applicable to contracts, and on other occasions recourse has been had to choice of law rules modeled on those for property disputes. To an extent, each of these characterizations reflects certain aspects of the underlying domestic laws governing marital property. Often those laws permit the spouses considerable scope for choice and bargaining respecting their rights in any property which either of them may own or come to own. In this respect the matter looks contractual. At the same time, domestic laws also recognize that parties often do not bargain over such matters and that a regime must be provided for them (or imposed on them), and that sometimes even when spouses do contract there is a need to protect the economically weaker party from inequalities in bargaining power. We might characterize this latter element

of domestic laws as proprietary, or as reflecting certain mandatory social policies based on status. At different times, and in different jurisdictions, one or the other of these aspects might be dominant in the domestic law of matrimonial property. At the level of purely domestic law it does not much matter how we label such laws. However when geographical complexities arise, the need to formulate choice of law rules of the traditional type makes the initial question of characterization a vital one.

In an early English decision on matrimonial property, *Lashley v. Hog* (1804), 47 E.R. 1243, the House of Lords applied a property-or status-type rule to the case. It decided that, even though the parties had been married in England at a time when the husband was domiciled there, the spouse's rights respecting moveable property should be decided by Scottish law, since that was where the husband was domiciled when he died. An obvious difficulty with this approach is that it allows a husband the opportunity to alter the marital property regime merely by changing his domicile. This concern was evidenced in a later decision of the House of Lords, *De Nicols v. Curlier*, [1900] A.C. 21, where a contract-type approach prevailed. In that case, two French citizens married in France in 1854. Nine years later they moved to England, acquired a domicile there and became British subjects. Thirty-four years after that, the husband died in England, leaving a large fortune and a will by which comparatively little was left to his widow. The widow argued that she was entitled to half the estate by the French law of community of property, which constituted a contract between the spouses. The spouses had entered into no formal agreement, but the evidence of French law revealed that, if persons marry without a written pre-nuptial contract, they are deemed to have adopted the community of property regime in the Civil Code. The Earl of Halsbury L.C. wrote: ([1900] A.C. at 26)

> If this is the law by which the matter is to be governed, it cannot be denied that the [widow] here must succeed, and it is a little difficult to understand upon what principle contracts and obligations already existing inter se should be affected by an act of one of the contracting parties over which the other party to the contract had no control whatever. And indeed, it is not denied that if, instead of the law creating these obligations upon the mere performance of the marriage, the parties had themselves by written instrument recited in terms the very contract the law makes for them, in that case the change of domicile could not have affected such written contract. I am wholly unable to understand why the mere putting into writing the very same contract which the law created between them without any writing at all should bar the husband from altering the contract relations between himself and his wife; when if the law creates that contract relation, then the husband is not barred from getting rid of the obligation which upon his marriage the law affixed to the transaction.
>
> A written contract is after all only the evidence of what the parties have agreed to, and it would seem to be of no superior force as evidencing the agreement of the parties than a known consequence of entering into the marital status.

De Nicols v. Curlier has been followed in Canadian cases such as *Devos v. Devos*, [1970] 2 O.R. 323. 10 D.L.R. (3d) 603 (C.A.). The effect of this approach is that, even though the parties executed no written agreement, a matrimonial regime (usually that of the husband's domicile) is imposed on them at the time of marriage and provides each spouse with certain vested rights. This regime is a sort of "proper law of the marriage contract", and does not change. After all—so the thinking goes—we would not expect the proper law of some commercial arrangement to change simply because one, or even both, of the parties subsequently changed domicile, so why should we expect the law governing the marriage contract to change? While such thinking protects the wife against the husband unilaterally altering the marital property regime by simply changing his domicile, it has defects of its own. Persons might marry in one jurisdiction with little or no thought as to its matrimonial property regime. They might later move to another jurisdiction (again with no thought as to its internal law of marital property) and pass many years there before a property dispute arises between them. Should the internal law of the first jurisdiction, with which they might long ago have severed all ties, govern such a dispute? The approach in *De Nicols* and *Devos* answers that question in the affirmative.

Canadian courts have not always followed the contract-like approach of *De Nicols v. Curlier* on this point. That approach has generally been confined to situations where the spouses expressly contract, or where the matrimonial property regime in the husband's domicile at time of marriage appears to provide the spouses with vested, "contract-like" rights. Where no such rights are provided, a proprietary, status-based approach to choice of law in matrimonial property still prevails. Thus in *Palmer v. Palmer* (1979), 107 D.L.R. (3d) 401 (Sask. C.A.) the spouses were domiciled in Manitoba and appeared to have no connection with Saskatchewan apart from the fact that the husband owned land there. They had no written agreement governing division of property on marital breakdown, and the Saskatchewan Court of Appeal did not view Manitoba law as providing them with any such contract. Consequently the court viewed dispute as a proprietary one and applied the usual rule, namely that the *lex situs* applies to matters of immoveables. Thus the wife could apply under the *Married Persons' Property Act*, R.S.S. 1978, c. M-6 for a division of the land.

As might be expected, either approach can lead to just results in an individual case, but both run into problems when the choice of law process forgets to take into account the content and context of the underlying laws. An example of this can be seen in the following case.

by the means stipulated; in short, it must be a statutory equivalent to a marriage contract.

But the statute of New Hampshire bears no such characteristic. Its provisions are in no sense predicated on marriage within the state nor are they referable only to such a marriage. It is not, therefore, a law creating "a conjugal association" as to property to which the law of Québec will give effect upon the death of one of the consorts.

It is contended that the controversy is concluded by the decision of this court in the case of *Stephens v. Falchi* [[1938] S.C.R. 354], but the facts there were wholly different. The putative marriage had taken place in Italy where the husband was domiciled. A marriage contract specifically submitted the matrimonial affairs to the law of that country and the civil rights enforced were those given by that law. Here there is neither contract nor statutory equivalent to annex to the marriage vinculum rights of property in the terms of the New Hampshire statute.

I would, therefore, allow the appeal and dismiss the action with costs throughout.

Kerwin J. delivered a separate concurring judgment for himself, the Chief Justice and Taschereau J.

NOTES

1. Because the court refused to characterize the New Hampshire regime as contractual, the wife had no vested rights to carry with her into Québec when the couple moved there. In *De Nicols v. Curlier*, Lord Halsbury, L.C. had been able to characterize the French regime as conferring vested rights on the wife because, although it was not a separate written contract, it was "a known consequence of entering into the marital status." Why did the New Hampshire statute not meet this test? Was it simply because the wife received no rights under the statute unless and until her husband predeceased her?

2. Had the spouses remained in New Hampshire, the widow would not have needed any "vested rights", as the statute in question would have applied anyway (either as part of the spouse's marital regime or simply as governing the husband's property because he would have died domiciled in New Hampshire with his property located there). Had everything taken place in Québec, the wife would not have needed such a statute because Québec's community of property regime would probably have applied. This regime was similar to that provided by the law of France in *De Nicols v. Curlier*, and would have given the wife half the husband's property (regardless of what his will said). In other words, both New Hampshire and Québec had schemes for limiting the husband's freedom of testation, but neither scheme applied here. New Hampshire's scheme did not

govern because it is characterized as status-based and as applying only to persons who died domiciled in that state. Québec's regime could not apply because, like the French regime in *De Nicols v. Curlier*, it is characterized as contract-based and as applying only to persons who marry in Québec (or, more probably, only when the husband is domiciled in Québec at the time of marriage). Thus the effect of the Supreme Court's decision is almost certainly to give the widow less than she would have received had all events taken place in either of the two concerned jurisdictions. In this respect the case raises problems similar to those we saw in *Charron v. Montreal Trust Co.* (*supra*, Vol. 1, p. 81).

Effect of Matrimonial Property Law Reform

Within the past fifteen years, all the Canadian provinces have enacted legislation significantly reforming their domestic law relating to matrimonial property. This is valid provincial legislation, though the Supreme Court of Canada has held it inapplicable to lands covered by the *Indian Act*: *Derrickson v. Derrickson*, [1986] 1 S.C.R. 285. None of these provincial statutes is identical to any of the others, though the thrust of all of them is similar. While they permit the parties to address by contract the issue of their respective property rights, in the absence of such agreement they provide for an equitable (and presumptively equal) sharing of property on marital breakdown. In some provinces the property to be shared is only that acquired during the marriage, while in other cases it applies to all property owned by either of the spouses (excluding business assets). In most instances no rights are conferred on the spouses by the mere fact of marriage. Rather, marital breakdown gives either spouse a right to apply to a court for a division of assets. This judicial division is made regardless of which spouse owns the assets in question.

Three provinces, British Columbia, Québec and Saskatchewan, did not address conflicts problems in their matrimonial property legislation. In those jurisdictions, courts continue to develop solutions along the lines of those sketched out above, as may be seen in the following decision of the British Columbia Court of Appeal.

Tezcan v. Tezcan
(1992), 87 D.L.R. (4th) 503
(B.C.C.A., Cumming, Gibbs and Hinds JJ.A.))

Cumming J.A.:—

Judgment Appealed From

This is an appeal from the judgment of Mr. Justice Harvey pronounced March 6, 1990 finding that the proper law to be applied is that of British Columbia and

> [Cumming J.A. then discussed issues relating to expert evidence regarding valuation, calculating the value of the Yurkish properties, and the tax consequences of the trial court's decision. The last-mentioned issue prompted him to amend one paragraph of the order the trial judge had made.]
>
> Subject to the aforesaid variation of the trial judge's order, I would dismiss the appeal.

NOTE

Recall the case of *Haumschild v. Continental Casualty* (*supra*, Vol. 1, 200) where an interspousal tort was characterized as giving rise to a matrimonial issue rather than a tort issue? Have you any doubt that the courts in *Tezcan* and *Haumschild* could have characterized those cases as either matrimonial claims or property/tort claims depending on what result would follow?

Although British Columbia, Québec and Saskatchewan did not address conflicts issues in their matrimonial property legislation, the statutes of the other seven provinces did explicitly deal with concerns. As with the substantive portions of the legislation, none of the statutory responses to the conflicts problems is precisely the same as any of the others. Nevertheless, a similarity of approach is evident, and at the risk of oversimplification some generalizations can be made. Where the spouses have addressed property issues by written agreement, those contracts will be given effect, regardless of where they were entered into or where the property in question was located. Where the spouses have not contracted, the solution was to adopt a new choice of law rule, one that refers disputes over the division of matrimonial property to the law of the last common habitual residence of the parties. This is, in effect, the choice of law rule in the Newfoundland, Nova Scotia, Prince Edward Island, New Brunswick and Ontario. (See *The Matrimonial Property Act*, S.N. 1979, c. 32, s. 30, *Matrimonial Property Act*, R.S.N.S. 1989, c. 275, s. 22, *Family Law Reform Act*, S.P.E.I. 1978, c. 6, s. 14, *Marital Property Act*, S.N.B. 1980, c. M-1.1, s. 44, and the *Family Law Act*, R.S.O. 1990, c. F.4, s. 15.) A leading decision on the meaning of the phrase "last common habitual residence" is *Pershadsingh v. Pershadsingh* (1987), 60 O.R. (2d) 437 (H.C.).

Two other provinces, Manitoba and Alberta, took a similar approach but did it by way of a statutory clause addressing the matter of jurisdiction. In other words, courts of those provinces will entertain an application for division of matrimonial property when the spouses' last common habitual residence was

within the province. (See the *Marital Property Act*, C.C.S.M., c. M45, s. 2(1), and the *Matrimonial Property Act*, R.S.A. 1980, c. M-9, s. 3.) These jurisdiction clauses are comparable to the jurisdiction clause in s. 3(1) of the *Divorce Act*, S.C. 1986, c. 4 in that they effectively operate to determine the choice of law issue as well. Just as Canadian courts which assume jurisdiction to grant a divorce will always apply Canadian law, the courts of Manitoba and Alberta assume jurisdiction to divide matrimonial property only when the necessary residence requirement is met, and then they apply forum law. (See *Wolch v. Wolch* (1980), 19 R.F.L. (2d) 307 (Man. Q.B.), aff'd (1981), 20 R.F.L. (2d) 325 (Man. C.A.).)

One can see in this last-common-habitual-residence rule—whether it is phrased as a statutory choice of law rule or as a jurisdiction clause determining the choice of law issue as well—a response to the defects of both common law approaches. Since the residence must have been a common one, the problem of the husband unilaterally changing the law governing the spouses' property rights *inter se* by simply changing his domicile is eliminated. Yet, since the matrimonial property regime can shift when the spouses move together, they will not have their rights determined by the law of a jurisdiction with which they have long lost contact. The solution seems so simple that one might well wonder why the courts could not a developed it on their own, instead of drawing on rules from other areas, neither of which was entirely appropriate.

It would be impossible to take up in detail here the issues under the various provincial statutes. The following two cases are included to show that the new choice of law rule has not eliminated the types of problems that existed previously.

Kerr v. Kerr
(1981), 32 O.R. (2d) 146, 121 D.L.R. (3d) 221
(High Court of Justice)

WALSH J.: The broad issue raised by these proceedings is: To what extent, if any, has the *Family Law Reform Act*, 1978 (Ont.), c. 2, altered the existing law with regard to the effect of a marriage contract entered into by Quebec domiciliaries in the Province of Quebec prior to their marriage on their subsequently purchased matrimonial home situate in the Province of Ontario where they both now reside and are domiciled?

The narrow question to be determined here is: whether a marriage contract that provides only that the spouses adopt a regime of separation as to property operates to defeat a claim brought by one spouse, the wife, under s. 4 of the *Family Law Reform Act, 1978*, for a division of family assets, namely, the sale of their matrimonial home which has always been registered solely in the name of the husband?

the net proceeds of such sale, after deduction of all proper adjustments, real estate commission and legal fees and disbursements, shall be divided equally between the spouses. If the spouses are unable to agree, the usual reference is directed to the Local Master at Ottawa to set the terms and conduct the sale.

NOTES

1. The Ontario Court of Appeal dismissed both an appeal and a cross-appeal at (1983), 41 O.R. (2d) 704. The relevant Ontario statute in *Kerr* has since been amended, but the problem in that case still arises, both in Ontario and in other provinces (e.g., *Mittler v. Mittler* (1988), 17 R.F.L. (3d) 113 (Ont. H.C.). The difficulty in *Kerr* stems from the fact that, at the time the parties entered into their separation of property agreement in Québec, the Québec courts province had no general power to order a division of property otherwise than in accordance with ownership. In other words, by opting for a separation of property regime instead of a community of property regime the parties did everything they could reasonably be expected to do in the circumstances to prevent judicial intervention in their property rights. An Ontario court might hesitate to give effect to such an arrangement if it feared an economically weaker spouse was being taken advantage of, but there is no indication that the court was concerned with that here.

2. If you are concerned that the decision in *Kerr* failed to take account of the context of the Québec marriage agreement, draft a clause which would permit spouses getting married in Québec to avoid such a result should they later move to a common law province.

3. Even where provincial matrimonial property legislation contains an express choice of law provision very fundamental problems of approach still arise, as the follow case illustrates. You may recall that this case was mentioned in Chapter 5, Escape Devices, in a note, *supra*, Vol. 1, p. 198.

Vladi v. Vladi
(1987), N.S.R. (2d) 356, 7 R.F.L. (3d) 337
(S.C., T.D.)

[The parties were Canadian citizens with extensive property in Halifax and elsewhere. The wife applied for a division of property under Nova Scotia's *Matrimonial Property Act*, which had the following choice of law provision:

> 22 The division of matrimonial assets . . . [is] governed by the law of the place where both spouses had their last common habitual residence, or, where there is no such residence, by the law of the Province.

The court found that the parties' last common habitual residence was West

decided in a future case.

West German law or Nova Scotia law

Counsel for Mrs. Vladi suggest that, if the results of fully applying the relevant foreign law are rejected, the scheme of division set out in the Nova Scotia statute should be adopted in substitution. I do not share that view. Because I have rejected the external law of West Germany (which is to say, Iranian law) it does not necessarily follow that the internal law of West Germany should be rejected also. In my opinion the renvoi under the external law of West Germany is readily severable from the scheme of division that is otherwise provided for under West German internal law. That being so, I do not think that the rejection of renvoi in this case can justify a complete disregard of the reference to foreign law that is called for in s. 22 of the Nova Scotia Act.

Counsel for Mrs. Vladi alternatively submit that, if West German law is to be applied, it should be applied fully; that is, not merely on the question of division but also as to the definition or scope of the affected assets. As noted, no separate concept of matrimonial assets is recognized under West German law. It provides generally for an equal division of all assets (including business assets) acquired by the spouses during their marriage. Business assets, on the other hand, are excluded from the definition of matrimonial assets in s. 4 of the Nova Scotia Matrimonial Property Act. Characterizing every inconvenient implication of the rules of West Germany and Nova Scotia as a form of discrimination or a violation of rights, counsel for the plaintiff would have me wield the Charter so as to fill in gaps and prune away unfavourable features of the two schemes. It is suggested, for example, that s. 22 of the *Matrimonial Property Act* should be "interpreted as if s. 22(1) was (sic) read as saying 'The division of assets' as opposed to 'The division of matrimonial assets'".

The question of renvoi aside, I cannot discover in the relevant rules the forms of discrimination or the violations of rights suggested by counsel for the plaintiff. It is also my opinion that I have no licence to rewrite s. 22 in the way that they propose. This application has been made under the Matrimonial Property Act of Nova Scotia and the plain meaning of its relevant provisions is that only matrimonial assets as they are defined in that statute are to be divided in accordance with the law of the place of last common habitual residence.

NOTES

1. Having decided to accept West German law's *renvoi* to the law of Iran, Burchell J. concludes that he will not apply Iranian law since it is archaic and repugnant. This leaves him with the question of whether to "return" to internal West German law or to retreat all the way to the internal law of Nova Scotia, a question which had apparently never arisen before. He concludes that since West Germany's *renvoi* is "readily severable" from its internal law he is justified in stopping in that country and applying the internal law of West Germany. Would interest analysis provide a more useful way of talking about this issue? Can you craft a principled argument for applying the law of West

Germany (or Nova Scotia, or Iran) in this case?

2. The (internal) law of West Germany calls for an equal split of all the parties' property, including that which Nova Scotia's statute would classify as "business assets". Yet in supposedly applying West German law Burchell J. confines the wife to a share of those assets which Nova Scotia's statute would classify as "matrimonial assets". Since the court could not be persuaded to give a broad reading to the term "matrimonial assets" in s. 22 why did it not deal with the business assets under the common law choice of law rules?

3. You should consider what you would do in drafting a contract between a couple about to be married in Ontario when it is clear that it is very likely that they will travel to a number of different countries over the course of the marriage. How well do the cases give you guidance in this situation?